(1) 83-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

ELOISE BEARD, as Administratrix of the Estate of Jeff Beard, the Deceased,

Petitioner,

v.

WILLIAM M. O'NEAL, L. PATRICK GRAY, KENNETH GRANT, ROY K. MOORE, and FEDERAL BUREAU OF INVESTIGATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 22, 1984

105 pp

Questions Presented

(1) Whether as a matter of law, a long time paid informant who, while working for the Federal Bureau of Investigation, participated in an abduction and murder by, *inter alia*, acting as the murderer's chauffeur, guarding the victim and encouraging the murderer, has violated the victim's Fifth Amendment right not to be deprived of life without due process of law.

(2) Whether as a matter of law, a long time paid informant who, while working for the Federal Bureau of Investigation, voluntarily accompanied a murderer and assisted in the commission of a murder has a constitutional duty to take any steps to prevent the victim's loss of life.

(3) Whether supervisory officials of the Federal Bureau of Investigation may be personally responsible for constitutional deprivations which occurred with their knowledge and consent.

(4) Whether the doctrine of sovereign immunity shields the United States from liability for knowingly providing assistance to a murderer.

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Petitioner prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this action on February 22, 1984, affirming two orders of the District Court granting summary judgment in favor of respondents.

Opinions Below

The opinion of the Court of Appeals, not yet reported, is reproduced in Appendix A. The Memorandum Opinion and Order of the District Court granting summary judgment in favor of Respondents Gray, Grant and Moore is

reproduced in Appendix B, the Memorandum Opinion and Order granting summary judgment in favor of Respondent O'Neal is reproduced in Appendix C, and the District Court's Order dismissing the Federal Bureau of Investigation is reproduced in Appendix D. The opinions of the Court of Appeals in two related actions are reported in *Beard* v. *Mitchell*, 604 F.2d 485 (7th Cir. 1979) and *United States* v. *Robinson*, 503 F.2d 208 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975).

Jurisdiction

The final judgment of the Court of Appeals was entered on February 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether as a matter of law, a long time paid informant who, while working for the Federal Bureau of Investigation, participated in an abduction and murder by, *inter alia*, acting as the murderer's chauffeur, guarding the victim and encouraging the murderer, has violated the victim's Fifth Amendment right not to be deprived of life without due process of law.

(2) Whether as a matter of law, a long time paid informant who, while working for the Federal Bureau of Investigation, voluntarily accompanied a murderer and assisted in the commission of a murder has a constitutional duty to take any steps to prevent the victim's loss of life.

(3) Whether supervisory officials of the Federal Bureau of Investigation may be personally responsible for constitutional deprivations which occurred with their knowledge and consent.

(4) Whether the doctrine of sovereign immunity shields the United States from liability for knowingly providing assistance to a murderer.

Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States expressly provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. Introduction

Petitioner filed the present action in the Northern District of Illinois seeking compensatory and punitive damages for the constitutional torts suffered by her brother, Jeff Beard, when he was abducted and murdered by Stanley B. Robinson ("Robinson") and F.B.I. informant William M. O'Neal ("O'Neal").

2. Statement of Facts

Informants are one of the most important investigative techniques and tools used by the Federal Bureau of Investigation ("F.B.I.") (App. 70.) Indeed, during 1972, it was the F.B.I.'s written policy to maximize their use (App. 36.) A major responsibility of F.B.I. agents was to identify potential informants from among individuals with criminal backgrounds or criminal contacts and to develop their use by the F.B.I. (App. 73-75.) Consistent with this policy, in January 1968, Special Agent Roy Martin Mitchell

("Mitchell") recruited O'Neal, a suspected car thief, to serve as an F.B.I. informant. (C.A. 494-95.)[1]

In general, after recruitment, the F.B.I. used informants to further its goals of solving crimes, locating fugitives, and discovering plans to commit crimes. (App. 75). In O'Neal's case, shortly after becoming an informant, the joined the Black Panther Party at Mitchell's request and then served as a "racial informant" for the next four years. (C.A. 208-85; 644-47.)

Despite the major roles played by informants, during the relevant time here, the F.B.I. had only limited policies and guidelines governing their use. The written policy was contained in the F.B.I.'s Manual of Instructions, Section 108. (The Manual of Instructions, Section 108 is reproduced in Appendix E.) Primary among the F.B.I.'s unwritten policies was its concern that informants not violate the constitutional rights of citizens. (App. 69.) Consistent with this concern, informants were instructed not to initiate or plan crimes or to participate in acts of violence. (App. 69, 79.) They were also told to do all in their power to discourage or minimize crimes committed in their presence. (App. 69, 77.) But even though the F.B.I. knew that informants would often be asked to participate in violent crimes, it had no specific guidelines, instructions or training programs to help informants handle such situations.

During O'Neal's tenure as a racial informant, he planned and engaged in numerous acts of crime and violence against both persons and property—all in direct contravention of this established F.B.I. policy. Among other things, he participated in a gunfight between police and the Black Panther Party (C.A. 550-51); he designed and constructed an electric chair for use by the Black Panthers (C.A. 425-26); and he distributed weapons to members of the party (C.A. 427, 429, 439). Additionally, during this time period, O'Neal was arrested for impersonating an F.B.I. agent (C.A. 505),

[1] Citations to a document contained in the Appendix to Brief of Plaintiff-Appellant, filed in the United States Court of Appeals are referred to as "(C.A. .)."

grand theft (C.A. 505), possession of narcotics (C.A. 513, 560), and conspiracy to commit murder. (C.A. 594-96.)

Mitchell was in almost daily contact with O'Neal and he and his superiors at the F.B.I. were aware of O'Neal's actions. (C.A. 547.) Neither Mitchell nor his superiors, however, took any disciplinary action against O'Neal. This too was in conformity with existing F.B.I. policy, which only required that a special agent "re-evaluate" an informant's usefulness upon learning that the informant had violated F.B.I. policy (App. 71-72.) Moreover, a Justice Department Opinion provided that in most situations, informants participating in crime, such as O'Neal, lacked the criminal intent necessary for prosecution since their participation was motivated by a desire to aid the F.B.I. in gathering evidence. (App. 78.)

Notwithstanding O'Neal's history of criminal and violent conduct, in early 1972 Mitchell asked O'Neal to join a criminal gang led by Robinson. (C.A. 517.) Special Agent Ira Lynn Roten was the agent in charge of the Robinson investigation. Respondent Kenneth Grant ("Grant") was Roten's supervisor and immediate superior; Respondent Roy K. Moore was the special agent in charge of the Chicago office; and Respondent L. Patrick Gray was the Acting Director of the F.B.I., the agency's chief supervisory and policy making officer.

Between February and mid-May, 1972, O'Neal provided Mitchell with a continuous flow of information concerning criminal activities engaged in by Robinson, O'Neal and other gang members—shakedowns, assaults, attempted murders and murders. (C.A. 319, 493, 593.) Despite this information, the F.B.I. did not withdraw O'Neal from the Robinson gang; did not order O'Neal to cease participating in the gang's criminal activities; did not notify potential victims of murder contracts; and took no other actions to protect the victims of the gang's activities. (C.A. 533-45.) Moore and Grant were kept apprised of O'Neal's activities by means of written and verbal reports from Mitchell. (C.A. 651, 658-67.)

After the successful murder of Verdell Smith by Robinson and O'Neal was reported to the F.B.I., Mitchell foresaw that O'Neal would participate in more murders. Mitchell gave O'Neal the following instructions:

> I could see that Mr. O'Neal could very possibly be in a position where he would be asked to kill someone. I did not want that to happen.
>
> And if that did happen, I asked him to at least have his gun out before he took any action whatsoever. I did not want Mr. O'Neal shooting any citizens and if he was . . . told to do this, I wanted to make sure that he had his weapon out because I felt that if he refused at that time, he would have to decide who he was going to shoot. . . . If anyone was shot, I wanted Mr. O'Neal shooting either Mr. Robinson or [his associates]. . . . I did not want a victim killed. (C.A. 533-42.)

On the afternoon of May 17, 1972, Robinson called O'Neal and told him that he would not see O'Neal that evening. O'Neal protested that he did not want to be excluded from any plans and eventually persuaded Robinson to include him in the night's activities. (C.A. 462.)

Late during the evening of May 17, 1972, Robinson and O'Neal set out to find and murder a man named Jeff. Initially, Robinson had only a vague description of their target. O'Neal encouraged Robinson to obtain a better description, which Robinson did. O'Neal and Robinson then searched for Jeff for the next two and a half hours. They eventually spotted him in a pool hall. (C.A. 400-05.)

Robinson and O'Neal waited outside the pool hall for the next 45 minutes. During this period, O'Neal called Mitchell's home to inform Mitchell of their activities. Finding Mitchell not home, O'Neal was unable to contact any other F.B.I. official, since, with the knowledge of Mitchell's supervisors, Mitchell had violated the F.B.I. policy requiring O'Neal to have at least two F.B.I. contacts. (C.A. 444.) O'Neal did not attempt to call the police or anyone else for assistance.

After the unsuccessful call to Agent Mitchell's home, O'Neal decided that Jeff's life was "in God's hands." (C.A. 450.)

Beard subsequently left the pool hall and was stopped by Robinson. Having previously arrested Beard, Robinson, a Chicago Police officer, falsely told Beard that he had an arrest warrant. Robinson searched and handcuffed Beard, put Beard in the back seat of a car driven by O'Neal and got into the back seat with Beard. (C.A. 406-08, 531.) Obeying Robinson's instructions, O'Neal drove the car onto the Dan Ryan Expressway and headed toward what Robinson described as "the Indiana District." (C.A. 447.)

Robinson interrupted their trip south to make a phone call. After Robinson left the car to make his call, O'Neal, who was armed, made no attempt to drive away or to warn Beard that Robinson intended to kill him—even though O'Neal believed Beard was about to die. (C.A. 447.) Robinson returned to the car, took the wheel and drove to Indiana.

After pulling the car onto a shoulder in Indiana, Robinson again left Beard and O'Neal alone in the car. Once again O'Neal did nothing to save Beard. (C.A. 418-19.) When Robinson returned to the car, he asked Beard to leave the car to talk. Robinson then shot Beard. Beard, though wounded, escaped. (C.A. 410-11.) O'Neal reacted to these events by telling Robinson that Robinson had "really screwed up" and was in serious trouble. (C.A. 449.) Thus encouraged, Robinson pursued Beard and caught him. Robinson shot Beard again, knocked Beard into the mud, bludgeoned Beard's head with a gun, held Beard's face in the mud and stabbed him with a knife until he died. O'Neal then helped Robinson hide Beard's body. (C.A. 410, 416-19.)

During the return trip to Chicago, Robinson's car was stopped by a Chicago police officer. While Robinson stayed in the car, O'Neal flashed Robinson's badge to the police

officer, and made no effort to inform him of the crimes which had just been committed. After a brief conversation with Robinson, the officer permitted O'Neal and Robinson to continue on their way. (C.A. 410-19.)

Robinson was arrested in February, 1973 and convicted, *inter alia*, of three violations of 18 U.S.C.A. § 242, including the criminal deprival under color of law of Jeff Beard's constitutional rights. *United States* v. *Robinson*, 503 F.2d 208 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975). On appeal from his conviction, Robinson argued that he should not have been prosecuted because:

> the manner by which the Government conducted its investigation of this case was so shocking to the conscience and violative of the underpinnings of due process. . . . Specifically, the defendants condemn the Government's use of an informant, O'Neal, who actively participated in the events of the conspiracy involving torture, extortion and murder. Also, the defendants contend that the Government failed to timely intervene in the series of crimes of which it had full knowledge in advance.

503 F.2d at 218.

Despite evidence showing this is precisely how the Robinson investigation was conducted, Special Agent John Otto testified during the trial of Beard's action against Mitchell, *Beard* v. *Robinson*, No. 75 C 3204 (N.D. Ill. 1978), *aff'd sub nom., Beard* v. *Mitchell*, 604 F.2d 485 (7th Cir. 1979), that this investigation was in complete conformity with existing F.B.I. policy, written and underwritten. (Excerpts from Agent Otto's testimony are reproduced in Appendix F.)

3. The District Court Proceedings

In her complaint below, petitioner contended that Gray, Grant and Moore are liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S.

388 (1971) ("*Bivens*"), in both their official and personal capacities for (1) their promulgation of constitutionally deficient F.B.I. policies regarding the use, supervision and permitted conduct of F.B.I. informants; (2) their own failures to properly use, supervise and control O'Neal and his F.B.I. contact, Mitchell; (3) their own misjudgments in selecting and/or consenting to the selection of O'Neal as an F.B.I. informant; (4) their own failures to arrest or have arrested Robinson prior to his murder of Jeff Beard; and (5) their own failures to adequately protect the public from inherently dangerous F.B.I. activities. Recovery was sought from O'Neal in his official and personal capacities under *Bivens* and 42 U.S.C. § 1983 for his actions under color of state and federal law which contributed to the constitutional deprivations suffered by Beard; to wit, his active participation in and failure to deter or prevent the abduction and murder of Jeff Beard. Plaintiff also sought relief from the F.B.I. for the constitutional torts committed against Jeff Beard under the agency's aegis.

On February 1, 1979 the District Court dismissed the F.B.I. and individual defendants in their official capacities on grounds of sovereign immunity. On July 27, 1979, O'Neal filed a motion for summary judgment which the District Court denied in all respects on February 13, 1980. On February 12, 1980, Gray, Grant and Moore moved for summary judgment, arguing, *inter alia,* that petitioner's action was barred by virtue of a judgment entered in *Beard* v. *Mitchell,* 604 F.2d 485 (7th Cir. 1979).[2] On May 8, 1980, O'Neal renewed his motion for summary judgment.

On April 1, 1982, the District Court granted the motion of Gray, Grant and Moore for summary judgment, ruling that "the doctrine of bar under *res judicata* . . . prevent[s] any further litigation of this matter." (App. 25-31.) The

[2] In the *Mitchell* action, petitioner had sought to hold Special Agent Roy Martin Mitchell liable for failing to train, supervise and control O'Neal and for recklessly or deliberately failing to prevent Beard's aduction and murder.

District Court disposed of O'Neal's renewed motion for summary judgment by denying the motion as stated, and instead holding that petitioner's *Bivens* action against O'Neal was also barred by the doctrine of *res judicata*. (App. 32-33.)

Because of the procedural nature of respondents' motions, petitioner has never had an opportunity to present evidence supporting her complaint allegations.

Petitioner appealed both decisions of the District Court. The appeals were consolidated, and the Court of Appeals affirmed the District Court's judgments.

4. The Court of Appeals' Decision

In its opinion, the Court of Appeals held that the doctrine of *res judicata* did not bar petitioner's action against the F.B.I. officials and O'Neal. (App. 4-6.) Nonetheless, the Court affirmed the District Court's judgments and held that, as a matter of law, "O'Neal did not have a constitutional duty to prevent Jeff Beard's murder." (App. 9.) Relying on its decision that O'Neal owed no constitutional duty, the Court also affirmed the judgment in favor of the F.B.I. officials without reaching the question of their personal responsibility for Beard's constitutional deprivations. (App. 11.)

Judge Swygert dissented in part. First he disagreed with the majority's holding that O'Neal owed no constitutional duty to prevent Beard's murder, stating that the majority's decision was not legally compelled but instead rested on facts not settled in the record. Specifically, Judge Swygert stated that the majority's analysis conflicted with other cases imposing a constitutional duty to protect upon the government where there is a custodial or other special relationship between the parties. He concluded there was an issue of fact concerning whether the F.B.I.'s initiative in placing O'Neal in the Robinson investigation and its knowledge that O'Neal might be faced with a situation

where violence or murder could occur, created a special relationship between respondents and Beard under which respondents owed Beard a constitutional duty to intervene. (App. 15-18.) Judge Swygert next stated that, contrary to the majority's conclusion that there was no causal link between O'Neal's action and Beard's injury, the facts alleged in petitioner's complaint supported a conclusion that O'Neal's conduct *was* a proximate cause of Beard's death. (App. 18-20.) Judge Swygert also dissented from the majority's conclusion that summary judgment in favor of respondents Gray, Grant and Moore was proper. Here, too, Judge Swygert felt that there was an issue of fact concerning whether Beard's deprivations occurred with respondents' knowledge and consent or if the facts established a plan or pattern of incidents which should have put respondents on notice of the threat of deprivations. (App. 20-22.)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Issues Of Broad National Significance As To The Limits The Constitution Places On An Informant's Participation In Crime And Conflicts With Other Appellate Decisions Which Impose Constitutional Limitations On The Government's Pursuit Of Evidence.

The Court of Appeals held as a matter of law, that there was no causal link between O'Neal's acts and Beard's death and thus absolved both O'Neal and the F.B.I. respondents. (App. 8.)

The Court of Appeals reasoned that O'Neal's participation in Robinson's crime was appropriate because he was only present to gather the evidence subsequently used to convict Robinson. (App. 8.) Underlying this rationale is the unspoken, and constitutionally unacceptable, belief that there are no limits on how far the F.B.I. and its criminal informant can go in the pursuit of evidence. The opinion below thus directly conflicts with decisions of other Courts

of Appeals, holding that the Constitution indisputably limits the government's search for evidence. *See, e.g., United States* v. *Perez,* 700 F.2d 1232, 1236 (8th Cir. 1983); *Riley* v. *Gray,* 674 F.2d 522, 528 (6th Cir.), *cert. denied,* U. S. , 103 S. Ct. 266 (1982); *United States* v. *Monclavo-Cruz,* 662 F.2d 1285, 1290-91 (9th Cir. 1981); *Doe* v. *Renfrow,* 631 F.2d 91, 92-93 (7th Cir. 1980), *cert denied,* 451 U.S. 1022 (1982).

Holding that O'Neal's conduct was passive as a matter of law,[3] the opinion below directly conflicts with established precedent which holds that the constitution prohibits a government actor from restraining or injuring citizens such as Beard. *See, e.g., Lessman* v. *McCormick,* 591 F.2d 605, 609, 611 (10th Cir. 1979) (police officer and bank employees' bodily restraint of plaintiff violated the concept of liberty guaranteed by the Fourteenth Amendment); *Black* v. *Stephens,* 662 F.2d 181, 188 (3d Cir. 1981), *cert. denied,* 455 U.S. 1008 (1982) ("A law enforcement officer's infliction of personal injury on a person by the application of undue force may deprive the victim of a Fourteenth Amendment 'liberty' without due process of law"); *Shillingford* v. *Holmes,* 634 F.2d 263, 265 (5th Cir. 1981) (physical abuse by police under color of state law constitutes a constitutional deprivation).

The importance of this issue and the need for guidelines from this Court to regulate the government's use of informants, as well as the conflicts between *Beard* and other decisions, justifies the grant of *certiorari* to review the issues below.

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[3] The following undisputed actions were called "passive":

(1) O'Neal encouraged Robinson to obtain a more accurate description of the intended victim so that the murder contract could be performed; (2) O'Neal facilitated Robinson's abduction of Beard by chauffeuring the car; (3) on two separate occasions, O'Neal—who was armed —guarded Beard while Robinson left the car; (4) after the first shot failed to kill Beard, O'Neal encouraged Robinson to complete the job, stating that Robinson had really "screwed up"; and (5) O'Neal drove the get-away car and assisted Robinson in escaping from the Chicago Police.

2. The Decision Below Directly Conflicts With Established Precedent Holding That Supervisory Officials Are Personally Responsible For Their Own Constitutional Torts.

The Court of Appeals completely failed to examine the individual acts and omissions of the F.B.I. respondents as shown by the record. Instead, the decision rested on the majority's apparent belief that petitioner was seeking to hold respondents liable on the theory of respondeat superior and on its own scepticism concerning petitioner's ability to show that these respondents caused Beard's constitutional injuries. (App. 11.)

Contrary to the majority's assumption, petitioner is not seeking to hold Gray, Grant and Moore liable for O'Neal's actions but rather for their own personal derelictions of duty. These respondents failed to properly supervise Mitchell and O'Neal; they improperly consented to the selection of O'Neal as an F.B.I. informant; they failed to arrest Robinson prior to Beard's murder and they further failed to take any steps to safeguard Beard's life. Furthermore, Gray, Grant and Moore shared responsibility for the development of the F.B.I.'s informant policy. Under this policy as it existed in 1972, there were no limits on the number of lives that could be taken before any preventitive measures were taken. That policy was constitutionally deficient and these respondents must be held for their own contributions to the wholly inadequate state of that policy.

The appellate decision directly conflicts with this Court's decision in *Monell* v. *Dept. of Social Services,* 436 U.S. 658 (1978), and with decisions in other circuits holding supervisory personnel responsible for their own constitutional torts irrespective of the liability of their subordinates. *Crowder* v. *Lash,* 687 F.2d 996, 1005 (7th Cir. 1982) (The personal responsibility requirement is satisfied where an official acts in reckless disregard of plaintiff's constitutional rights or where the conduct causing the constitutional deprivation occurred at the officials direction or with

his knowledge and consent); *Bowen* v. *Watkins*, 669 F.2d 979, 988 (5th Cir. 1982); *Vasquez* v. *Snow*, 616 F.2d 217, 220 (5th Cir. 1980) (supervisor may be liable for failure to control a subordinate with known lawless propensities); *McCelland* v. *Facteau*, 610 F.2d 693, 696 (10th Cir. 1979) (police chief liable for policy-making malfeasance).

This conflict with established precedent holding supervisory personnel liable for their own constitutional torts justifies the grant of *certiorari*.

3. The Decision Below Directly Conflicts With Decisions In Other Courts Of Appeal And Raises Significant And Recurring Problems Concerning The Circumstances Under Which The Government's Inaction Rises To The Level Of A Constitutional Tort.

The Court of Appeals held that, as a matter of law, "O'Neal did not have a constitutional duty to prevent Jeff Beard's murder." (App. 9.) This decision ignores evidence establishing a special relationship between respondents and Beard,[4] and so it directly conflicts with the decisions of other circuits holding that the Constitution does impose a duty upon the government to protect its citizens.

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[4] The following facts shown by the record establish the existence of a special relationship: William O'Neal was present at the scene of Jeff Beard's murder to gather information in concert with the Federal Bureau of Investigation. He was performing a federal law enforcement function as an agent of the federal government and under color of federal authority. O'Neal misused his authority as an F.B.I. informant and violated at least two of the substantial duties placed upon informants by the F.B.I., namely (1) the duty to prevent crime and (2) the duty not to participate in crimes or violence. O'Neal acted as an armed guard and restrained Beard's ability to escape from Robinson. O'Neal also failed to take advantage of several opportunities he had to save Beard's life or at least warn him of his danger. He sat passive and mute both when Robinson left the car to make a phone call some distance away and later when Robinson left Beard and O'Neal alone in the car at the murder scene.

In *Clark* v. *Taylor*, 710 F.2d 4, 9 (1st Cir. 1983), the court held that a prison warden had a constitutional duty to protect the safety and well-being of prison inmates. In *Doe* v. *Dept. of Social Services*, 709 F.2d 782, 791 (2d Cir.), cert. denied, U.S. , 104 S. Ct. 195 (1983), the court held that the City's failure to protect the plaintiff by properly supervising her foster home placement violated the constitution. In *Davis* v. *Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979), the court held that a *prima facie* case for relief under § 1983 was stated where a prison guard watched another inmate attack plaintiff with a knife without acting to protect plaintiff.

Here, the F.B.I. encouraged O'Neal to participate in Robinson's activities knowing that he would likely be asked to participate in crimes of violence. This conduct created a special relationship between the F.B.I. and Beard. Likewise, O'Neal's custody of Beard and his specific knowledge that Beard was about to be murdered created a special relationship which imposed a duty upon O'Neal to take steps to save Beard's life.

Certiorari should be granted for the additional reason that there is no uniform analysis among the circuits concerning when the government's tortious failure to provide services rises to the level of a constittuional tort. Indeed, this issue presents one of the most perplexing problems facing the courts today. *Jackson* v. *City of Joliet*, U.S. , 104 S. Ct. 1325 (1984) (White, J. dissenting).

In *Martinez* v. *California*, 444 U.S. 277, 285 (1980), this Court looked to the directness of the connection between the official's act and the loss of the constitutional right in analyzing whether state parole officials had a constitutional duty to protect a woman murdered by a parolee. In particular, the court focused on the state officials' knowledge of the victim's identity and danger, as well as the time interval between the officials' act and the harm.[5]

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[5] Petitioner can recover under the standard set forth in *Martinez*: O'Neal's conduct occurred simultaneously with Beard's deprivations and O'Neal knew at the time that Beard was about to die.

The Fourth Circuit analyzes the government's duty to provide services by looking for a special relationship between the government and the injured party. *Fox* v. *Curtis*, 712 F.2d 84, 88 (4th Cir. 1983); *Withers* v. *Levine*, 615 F.2d 158, 161 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); *Davis* v. *Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979); *Woodhous* v. *Virginia*, 487 F.2d 889, 890 (4th Cir. 1973).[6]

Other Appellate Courts analyze the constitutional issue by determining whether the government actor has violated some established duty. *Doe* v. *Dept. of Social Services*, 709 F.2d 782, 791 (2d Cir. 1983) (duty imposed by state statute to report cases of suspected child abuse); *Clark* v. *Taylor*, 710 F.2d 4, 9 (1st Cir. 1983) (warden's duty to protect safety and well being of prisoners); *Hirst* v. *Gertzen*, 676 F.2d 1252, 1263 (9th Cir. 1982) (duty to protect from unreasonable risks of harm); *Putman* v. *Gerloff*, 639 F.2d 415, 423 8th Cir. 1981) (duty imposed on police officer by his office to intervene to prevent victim's punishment); *Dimarzo* v. *Cahill*, 575 F.2d 15, 17-18 (1st Cir.) *cert. denied*, 439 U.S. 927 (1978) (duty imposed by state statute to promulgate standards for corrective facilities); *Byrd* v. *Brishke*, 466 F.2d 6, 11 (7th Cir. 1972) (duty of police officer to enforce the laws and preserve the peace).[7]

Moreover, additional confusion arises because the courts using the latter two modes of analysis often do not articulate the source of the duty or relationship, *see, e.g., Clark* v. *Taylor*, 710 F.2d at 9; *Hirst* v. *Gertzen*, 676 F.2d at 1252, and also do not look to any uniform source for the special relationship or duty. *See e.g., Fox* v. *Curtis*, 712 F.2d at 88 n.3 (common law tort analysis); *Doe* v. *Dept. of Social Services*, 709 F.2d at 791 (state statutory duty); *Byrd* v.

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[6] As discussed earlier at 15, petitioner can recover under this analysis. The F.B.I.'s actions in placing O'Neal in a situation it knew could be dangerous, as well as O'Neal's custody of Beard, created a special relationship which imposed a duty upon the F.B.I. and O'Neal to protect Beard's life.

[7] Here, too, Beard can recover because respondents violated established F.B.I. policies.

Brishke, 466 F.2d at 11 (duty of office). *See also Smith* v. *Warde*, U.S. , 103 S. Ct. 1625, 1628 (1983), where this Court referred to modern tort decisions in construing § 1983.

The Seventh Circuit does not follow any of these approaches but instead holds that the constitution is a charter of negative liberties that does not require positive action. *Beard* v. *O'Neal*, App. 10; *Jackson* v. *City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, *U.S.* , 104 S. Ct. 1325 (1984); *Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

Clearly, not every tortious action or inaction by the government rises to the level of a constitutional deprivation. It is equally clear, however, that under certain circumstances the government's conduct is sufficiently egregious to be a constitutional tort. This case provides the Court with an opportunity to resolve the conflicts and confusion by establishing appropriate guidelines as to when the Constitution requires the government to protect its citizens.

4. The Decision Below Directly Conflicts With This Court's Decision In *Jacobs v. United States* By Impermissibly Shielding The Federal Bureau Of Investigation From Liability For Its Constitutional Torts.

The decision below directly conflicts with this Court's decision in *Jacobs* v. *United States*, 290 U.S. 13 (1933), which holds that the federal government is not privileged to avoid liability for its constitutional torts. The issue in *Jacobs* was whether plaintiff was entitled to pre-judgment interest against the United States in a Tucker Act case to recover damages for a riparian taking. The Fifth Circuit denied plaintiff's claim for interest, holding (1) that the government had by statute (28 U.S.C. § 284) conditioned its consent to be sued for pre-judgment interest on plaintiff's showing that the government had entered into "a contract expressly stipulating for the payment of [such] interest" and (2) that no such demonstration had been

made. *United States* v. *Jacobs*, 63 F.2d 326, 327 (5th Cir.), *rev'd*, 290 U.S. 13 (1933). This Court reversed, holding that because "[t]he suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain . . . [as] guaranteed by the [Fifth Amendment]," 290 U.S. at 16, the plaintiffs were entitled to pre-judgment interest as a matter of Constitutional law *notwithstanding their inability to meet the statutory condition on which the government had consented to be sued for interest.* Chief Justice Hughes unequivocally dismissed the government's contention that in the absence of the showing required by 28 U.S.C. § 284, the government was immune from suit:

> Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

290 U.S. at 16. Thus, as in *Jacobs*, the present defendants cannot avoid liability for their constitutional torts merely by asserting that the government has not consented to be sued for such acts.

The judicial doctrine of sovereign immunity does not privilege the Federal government to violate the Constitution because "[t]he United States Constitution was adopted to provide a check upon 'sovereign power.' " *United States* v. *United States District Court*, 444 F.2d 651, 665 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972). The Constitution indisputably gave Jeff Beard the right to be free from loss of life at the hands of the government, *Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974), and not to be "thrown . . . into a snake pit," *Bowers*, 686 F.2d at 618. If the government can avoid all liability for violating the Constitution by claiming the protection of the doctrine of sovereign immunity, the constitutional limitations on government conduct are meaningless.

Moreover, if the government is permitted to hide behind the doctrine of sovereign immunity here, it will avoid all responsibility for its deficient policies. In *Slagle* v. *United States,* 612 F.2d 1157, 1161, 1162 (9th Cir. 1980), the court held that the federal government's policies with respect to the selection and use of informants are discretionary functions which may not be challenged under 28 U.S.C. § 2680. *Accord, Liuzzo* v. *United States,* 565 F. Supp. 640, 646 (E.D. Mich. 1983) (Because the standards established for the use of informers by the F.B.I. constitute a discretionary function, their adequacy cannot be challenged under 28 U.S.C. § 2680).

Additionally, sound policy dictates that the present action proceed against the United States and the F.B.I. individual defendants in their official capacity. This investigation was conducted in accordance with F.B.I. policy. To the extent Jeff Beard's injuries or death resulted from institutional breakdown rather than culpable individual misjudgment, it would be particularly just and proper that the institution of the F.B.I. be held liable. This policy issue, as well as the direct conflict with *Jacobs,* justifies the Court's grant of *certiorari* to review the issues below.

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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Dated: May 22, 1984

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-1893, 82-2096

ELOISE BEARD, as Administratrix of the Estate of Jeff Beard, deceased,

Plaintiff-Appellant,

v.

WILLIAM M. O'NEAL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4706—**James B. Parsons**, *Judge.*

ARGUED APRIL 1, 1983—DECIDED FEBRUARY 22, 1984

Before ESCHBACH and COFFEY, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

ESCHBACH, *Circuit Judge.* An F.B.I. informant accompanied a murderer on the night that the murderer killed the plaintiff's brother. The issue in this case is whether that informant breached a constitutional duty owed to the murder victim and consequently caused the victim's death. We conclude, based on the undisputed facts, that he did not and thus we affirm the judgment of the district court. It follows from this conclusion that the judgment entered in favor of F.B.I. supervisory officials must also be affirmed.

I.

The facts surrounding the murder of Jeff Beard have been litigated in at least two trials and reported in two opinions of this court. *See United States v. Robinson*, 503 F.2d 208 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975); *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979). The basic facts have thus become fixed through litigation and time and are not generally disputed in the instant case. We will not again recite the colorful history of William O'Neal, an F.B.I. informant connected with Beard's death; instead we will set forth the salient facts of Jeff Beard's murder over ten years ago.

William O'Neal was considered by the F.B.I. to be an excellent informant. As such, his contact person in the F.B.I., agent Roy Mitchell, encouraged O'Neal to gather information about a Chicago police officer named Stanley Robinson. In April of 1972, therefore, O'Neal accompanied Robinson during several criminal episodes, including a homicide. O'Neal related Robinson's activities to agent Mitchell, who naturally was skeptical about the claim that a police officer was a violent criminal. In accordance with F.B.I. procedure, agent Mitchell reduced O'Neal's statements to writings available for inspection by his superiors.

On the afternoon of May 17, 1972, Robinson called O'Neal and told him that he would not see O'Neal that evening because of other plans. O'Neal protested that he did not wish to be excluded from any plans. Robinson then explained that his plans consisted of a small job of no interest to O'Neal. Nevertheless, O'Neal did persuade Robinson to include him in the night's activities.

Robinson, accompanied by O'Neal, set out that night to perform a murder contract. Robinson only had a vague description of the target and only knew his first name—Jeff. After driving around searching for Jeff for some time, Robinson acquired some better identification information concerning Jeff. Robinson then returned to the search for 2½ hours until O'Neal stated that he was tired

and wanted to go home. While driving O'Neal back to his car, Robinson fortuitously spotted Jeff Beard in a pool hall.

Robinson and O'Neal sat in the car outside of the pool hall for 45 minutes. During that time O'Neal went to a telephone and tried to call agent Mitchell at his home. Mitchell was not at home and O'Neal returned to the car. When Beard finally came out of the pool hall, Robinson approached, arrested, and handcuffed him. Robinson and Beard got in the back seat of the car and Robinson ordered O'Neal to drive to the "Indiana District," which O'Neal interpreted as an instruction to drive south. O'Neal drove south until Robinson, who wanted to make a telephone call, ordered him to exit from the expressway. O'Neal did exit and Robinson left the car for 3 to 5 minutes to make a call.

When Robinson returned to the car, he began driving and told Beard that he was not under arrest but that they wanted him to sell narcotics. After entering Indiana, Robinson pulled off on the shoulder of the road and asked Beard to get out of the car so that they could talk. O'Neal remained in the car. When Beard got out of the car, Robinson shot him; the wound was not fatal however and Beard raced across the road. O'Neal told Robinson that he had really "messed up." Undaunted, Robinson pursued Beard across the road, caught up with Beard, and murdered him.

O'Neal called agent Mitchell early the next morning and reported the murder of Jeff Beard. Owing chiefly to O'Neal's testimony, Robinson was subsequently convicted on charges of violating Jeff Beard's constitutional rights, *see* 18 U.S.C. §§ 241, 242. *See United States v. Robinson*, 503 F.2d 208 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975). Robinson was sentenced to life imprisonment.

In 1976 Eloise Beard brought this action directly under the Constitution, *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for damages relating to the murder of her brother.

Named as defendants in this suit were O'Neal, agent Mitchell's supervisors in the F.B.I.'s Chicago office, and the acting director of the F.B.I.[1] The plaintiff brought a separate *Bivens*-type suit against agent Mitchell.

While the instant case was pending, the action against Mitchell went to trial before a jury. The jury returned a general verdict in Mitchell's favor; judgment was accordingly entered, and we affirmed, *see Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979). The district court in the present case subsequently cited the *Mitchell* litigation and ruled that res judicata barred the plaintiff's *Bivens*-type claims against the F.B.I. officials and O'Neal. The defendants' motions for summary judgment were accordingly granted and these appeals pursuant to 28 U.S.C. § 1291 followed.

II.

Under the res judicata doctrine, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Montana v. United States*, 440 U.S. 147, 153 (1979). Mutuality of parties remains an essential element of the doctrine. *Nevada v. United States*, 103 S. Ct. 2906, 2925 (1983). Res judicata bars the present claims againt O'Neal and the F.B.I. officials, therefore, only if these defendants are in privity with agent Mitchell.

We can discern no basis for holding that all F.B.I. agents and informants, sued individually for their own acts or inactions, are in privity for res judicata purposes. *See Restatement* (Second) *of Judgments* §§ 43-61 (1982). To be sure, Mitchell and all of the defendants in this case are associated with the F.B.I. For res judicata purposes, however, we fail to perceive why this relationship is relevant and why a suit against one F.B.I. agent should be considered a suit against all people associated with the agency.

[1] The F.B.I. was also named as a defendant but the district court properly dismissed it on the ground of sovereign immunity.

The case that the defendants cite in connection with their privity argument, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), provides no support once the case is examined fully and in its historical context. In that case the Court wrote:

> Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. . . . There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government.

Id. at 402-03. This holding, however, is a description of the modern doctrine termed "collateral estoppel"—once an issue is actually litigated, that determination is conclusive in a subsequent suit involving *one* party to the prior action. *See Montana v. United States*, 440 U.S. 147, 153 (1979). At the time *Sunshine Anthracite Coal Co.* was decided, the term "res judicata" was still used to encompass the then emerging doctrine of collateral estoppel, which does not require mutuality of parties. *See* 1B J. Moore, *Moore's Federal Practice* ¶ 0.441[2] (1983). *Sunshine Anthracite Coal Co.*, therefore, stands for the currently unexceptional principle of collateral estoppel that when a person sues a government official, all issues actually litigated are binding in a subsequent suit against another government official.

If agent Mitchell and the current defendants were sued only in their official capacities, then they would clearly be privies. Official-capacity suits are, in reality, suits against government entities—in this case, the F.B.I. *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690 n.55 (1978). Separate suits against F.B.I. officials in their official capacities, therefore, are suits against the F.B.I. and res judicata principles would apply. *See Lee v. Peoria*, 685 F.2d 196, 199 n.4 (7th Cir. 1982).

In the absence of privity, the defendants are still entitled to contend that some issues, litigated in the *Mitchell* case adversely to the plaintiff, bars recovery in the present case. Such an argument has some appeal; because agent Mitchell was found not liable to the plaintiff, it might seem to follow that his F.B.I. supervisors must also not be liable.

The jury in *Mitchell*, however, returned a general verdict in the agent's favor. The jury may have found in Mitchell's favor on one or more of several grounds: for instance, (1) that O'Neal did not breach a constitutional duty, (2) that Mitchell was not personally responsible for O'Neal's acts, or (3) that Mitchell was entitled to qualified immunity. On appeal, we expressed serious doubt about whether Mitchell was personally responsible for O'Neal's conduct and whether O'Neal was a proximate cause of Jeff Beard's death. *See* 604 F.2d at 499-500. Given the posture of the appeal, however, our doubt was not translated into holdings. Thus, from reading the general verdict and our opinion in *Mitchell*, it is unclear what issue or issues were decided against the plaintiff. Rather than extend and apply collateral estoppel in this unclear area, we prefer to affirm the district court's judgments on another ground—one that applies to the F.B.I. officials and O'Neal.

III.

The Fifth Amendment guarantees, among other things, that a person will not be deprived of life without due process of law. Jeff Beard had a constitutional right, therefore, not to be murdered by someone acting under color of federal authority.[2] *See generally Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961). The plaintiff's suit against O'Neal and the F.B.I. officials is purportedly founded on O'Neal's violation of that right.

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[2] For the purpose of this opinion, we will assume, without deciding, that O'Neal acted under the color of federal authority.

At various points the plaintiff alleges that O'Neal "participated" in the events that led to Beard's death. Use of a vague word such as "participate," however, does little to advance the constitutional analysis in this case. A witness or a victim might be termed participants in a criminal episode, yet we would not call them criminals. We must thus analyze O'Neal's specific acts and determine whether this conduct breached a constitutional duty owed to Beard and, if such a breach occurred, whether it may have caused Beard's death.

The plaintiff does not contend that O'Neal is responsible for Robinson's acts in the way that a conspirator might be responsible for a co-conspirator's conduct. It is undisputed that O'Neal did not want Beard killed. On at least two occasions O'Neal took steps to save the lives of people whom Robinson intended to murder. Moreover, O'Neal became associated with Robinson and was with him on the night of Beard's murder only to obtain information for agent Mitchell. Before the murder, in fact, O'Neal attempted to telephone Mitchell to inform him of Beard's peril; tragically, Mitchell was not at home. And shortly after Beard was killed, O'Neal informed Mitchell of the event. In no sense, therefore, can it be said that O'Neal directed or approved of Robinson's conduct.

This case is unlike a situation where a uniformed police officer, who is in a position to prevent violence, observes a murder without intervening in any way. Absent an explanation for the officer's inaction, it might be legitimate to infer that he approved of the murder. Indeed, the officer's presence and authority might facilitate the murder by providing the symbolic support of the government. In such a case, the officer might be personally liable for the acts of the person who operated the murder weapon. The same cannot be said in this case, where O'Neal had reasons (*e.g.*, fear for his safety and loss of his guise) not to take further steps to prevent Beard's murder.

Nevertheless, O'Neal is responsible for his own actions. O'Neal's decision to accompany Robinson on the night of

the murder must thus be examined. In essence, the plaintiff contends that O'Neal had a constitutional duty not to be in Robinson's presence on that tragic night.

We hesitate to hold that a long-term government informant has a constitutional duty to refrain from being in a position to witness crimes involving the deprivation of life, liberty, or property. One of the functions of an informant is to witness crimes so that an arrest can be made and future crimes prevented. Robinson was arrested and convicted in large part because of O'Neal's decision to accompany Robinson; had O'Neal remained at home and Robinson escaped criminal liability, the number of Robinson's victims undoubtedly would have grown. We need not rule on the constitutionality of O'Neal's decision to accompany Robinson, however, because the undisputed facts reveal that there is no causal link between O'Neal's acts (as distinguished from his inaction) and Jeff Beard's death.

A plaintiff may not recover damages for a constitutional tort without establishing causation in fact—i.e., that the defendant caused the claimed injury. *See Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983); *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *see generally* W. Prosser, *Prosser on Torts* 244 (1971). In one constitutional tort case, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Supreme Court held that the plaintiff could not recover if the claimed injury would have occurred anyway. A strict application of this "but for" test of causation would deny recovery in the case of joint causation, where either of two forces would have produced the injury independent of the other. It might therefore be appropriate in some cases to apply a broader notion of causation, one that will permit recovery in the case of joint causes. Under either a strict or broad definition of causation, however, O'Neal's actions cannot be described as a cause of Beard's death.

The record shows that Robinson murdered several individuals, without O'Neal's assistance, prior to Beard's

murder. Robinson further made it clear that he intended to kill Beard on the night of May 17 without O'Neal's involvement. Robinson did not seek or want O'Neal's assistance. For purposes of gathering information, O'Neal insisted on going with Robinson on the night of Beard's murder, but in no way did O'Neal's presence significantly increase Beard's peril. In fact, O'Neal's presence provided a witness, a factor that would make many murderers hesitant. Moreover, O'Neal attempted to contact agent Mitchell to inform him of Beard's danger, thus providing Beard an opportunity to survive that he otherwise would not have had. O'Neal's actions can only be said to have caused Robinson's arrest and conviction, not Beard's death.

Our analysis on causation to this point is little more than a restatement of our observation in *Beard v. Mitchell* that "we have great difficulty describing O'Neal's conduct as a proximate cause of Beard's death without definitely holding that he had a fixed duty to prevent the crime." 604 F.2d at 499 (footnotes omitted). Given the posture of that appeal, it was unnecessary for us to decide whether O'Neal's *inaction* breached a constitutional duty and caused Beard's death. We must now answer that previously unresolved issue.

In a sense, O'Neal's inaction caused Beard's death; if O'Neal had intervened and prevented the crime, Beard would not have been murdered. However, this is merely a tautological statement that could be made about anyone alive at the time of the murder. We each failed to prevent the crime and thus Jeff Beard died. We are all not liable for damages, however, because clearly we did not all have a constitutional duty to intervene. For the sake of clarity, therefore, our focus of attention must be on whether O'Neal had a constitutional duty to act to prevent the murder, not whether O'Neal's inaction caused Beard's death. *See generally* L. Green, *Rationale of Proximate Cause* 11-43 (1927).

We hold that O'Neal did not have a constitutional duty to prevent Jeff Beard's murder. In *Bowers v. DeVito*, 686

F.2d 616 (7th Cir. 1982), a case also involving the deprivation of life, we had occasion to discuss the Constitution's guarantee of due process:

> [T]here is no constitutional right to be protected by the [government] against being murdered by criminals or madmen. . . . The Constitution is a charter of negative liberties; it tells the [government] to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Id. at 618. O'Neal's failure to take steps to protect Beard may be considered "monstrous," but such failure did "not violate the due process clause of the . . . Constitution." *Id.*; *see Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983); *see generally Jackson v. City of Joliet*, No. 82-2833, slip op. at 7 (7th Cir. Aug. 23, 1983).

At oral argument the plaintiff attempted to turn *Bowers v. DeVito* around to support her case. The plaintiff argued that O'Neal's role was not merely passive because he put Beard in a position of danger just as if he "had thrown him into a snake pit." *Bowers*, 686 F.2d at 618. We cannot discover, however, any special relationship between O'Neal and Beard that gave rise to a constitutional duty to provide protection. Jeff Beard was a "member[ ] of the general public, living in a free society, and having no special custodial or other relationship with" the F.B.I. or O'Neal. *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983). Neither O'Neal nor any agent of the F.B.I. singled Beard out to be killed. Chicago police officer Stanley Robinson targeted, abducted, and murdered Jeff Beard. The plaintiff's constitutional tort case is against Robinson, not O'Neal and the F.B.I. officials.

Finally, we note that this case is not brought under the Federal Tort Claims Act. Whether the defendants violated some common law duty is thus not an issue on this appeal. Our decision is not based on the common law of Illinois; rather we hold, on the basis of the undisputed facts, that O'Neal committed no constitutional tort that led to the plaintiff's brother's death.

IV.

The F.B.I. defendants may be held liable only if O'Neal committed a constitutional tort for which they were personally responsible. We seriously doubt that the F.B.I. defendants, who never had any immediate contact with O'Neal, could be found personally responsible. *See Lojuk v. Quandt*, 706 F.2d 1456, 1468 (7th Cir. 1983); *Crowder v. Lash*, 687 F.2d 996, 1006 (7th Cir. 1982). In light of our decision that O'Neal is entitled to summary judgment on the *Bivens*-type claim, however, we may affirm the judgment in favor of the F.B.I. officials without reaching the question of personal responsibility.

The judgments of the district court are affirmed.

SWYGERT, *Senior Circuit Judge*, dissenting in part and concurring in part. The death of Jeff Beard at the hands of a Chicago police officer, Stanley Robinson, and in the company of an FBI informant, William O'Neal, has spawned numerous criminal and civil lawsuits. In one Robinson was prosecuted and convicted of depriving Beard of constitutional rights. *United States v. Robinson*, 503 F.2d 208 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975). In another the administratrix of Beard's estate sought relief under 42 U.S.C. § 1983 (1976 & Supp. V 1981) against Robinson, O'Neal, Roy Martin Mitchell, the FBI agent to whom O'Neal directly reported, and other unknown FBI agents, for conspiring to deprive and actually depriving Beard of life under color of state law. *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978). At least some of these section 1983 claims are still pending. In a third case the administratrix sought relief under the United States Constitution, *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Mitchell for reckless training and super-

vision of O'Neal; we affirmed a general jury verdict exonerating Mitchell. *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979). Finally, the present action, which the district court refused to consolidate with *Beard v. Mitchell*, was brought, seeking *Bivens* relief against O'Neal for contributing to Beard's death by failing to intervene and by other actions; against Kenneth Grant, an FBI special agent who supervised the FBI's investigation of Robinson, Roy K. Moore, the FBI special agent in charge of the Chicago office, and L. Patrick Gray, the Acting Director of the FBI, for supervisory and policymaking failures in their individual and official capacities; and against the FBI itself. The district court below dismissed the damage claims against the FBI and against the individual defendants in their official capacities on the ground of sovereign immunity; entered summary judgment on the individual-capacity claims against the FBI officers on res judicata grounds, reasoning that the exoneration of Mitchell adversely resolved an element vital to the supervisory liability claims; and entered summary judgment in O'Neal's favor on res judicata grounds, reasoning that *Beard v. Mitchell* foreclosed FBI liability and that the same reasoning applied to O'Neal. Although it properly rejects the defendants' arguments urging affirmance on res judicata and collateral estoppel grounds, the majority now affirms the grant of summary judgment on the alternative grounds that O'Neal was not an active participant in the murder and owed no duty derivable from the Constitution to prevent it, and that the FBI officers' liability is dependent on O'Neal's. Because I believe these conclusions are not legally compelled, but depend on factual premises not settled in the record, I dissent from that portion of the opinion. I agree, however, that sovereign immunity bars the damage claims against the FBI and the officers in their official capacities.

I

The majority concludes that Robinson would have killed Beard even without O'Neal's participation, and that

O'Neal consequently can be liable for the murder only if he had a constitutional duty to intervene. It correctly states much of the law controlling this potential liability. In *Baker v. McCollan*, 443 U.S. 137, 146 (1979), the Supreme Court held that breach of a state-law duty to confirm the identity of arrestees was insufficient to make out a constitutional claim for deprivation of liberty under section 1983, because "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." I assume this analysis also applies to constitutional claims under *Bivens*. For his conduct to be actionable under *Bivens*, therefore, O'Neal must have owed Beard some duty created by the Constitution. If O'Neal had pulled the trigger or bludgeoned, stabbed, and smothered Beard, as Robinson did, this issue would be easy, for the fifth amendment explicitly forbids the deprivation of life without due process, and such acts clearly deprive the victim of life. The difficulty in this case is determining whether less direct acts may also constitute deprivation, for the term "deprive" is not entirely self-explanatory.

In one case the Supreme Court rejected a section 1983 claim that state officials indirectly deprived a victim of life. In *Martinez v. California*, 444 U.S. 277, 283-85 (1980), it concluded that state parole officers were not liable for the murder committed by a prisoner they had released, because even if under some circumstances they owed a duty of care under state law in making parole decisions, they did not "deprive" the victim of life because the danger to her was remote and unparticularized. It cautioned, however, that it was not deciding "that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." *Id.* at 285 (footnote omitted). *Martinez* thus refines the meaning of "deprivation" by establishing the importance of the directness of the connection between the official's action and the loss of a constitutional right such as life, but does not explicitly establish a yardstick for determining the degree of directness required by the

Constitution. Its reference to state law and use of a mode of analysis commonly employed in state tort decisions, *cf. Thompson v. County of Alameda* 27 Cal.3d 741, 750-53, 614 P.2d 728, 732-34, 167 Cal. Rptr. 70, 74-76 (1980) (psychiatrist liable only to identifiable victims of patient's violence); *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 439 & n.11, 551 P.2d 334, 345 & n.11, 131 Cal. Rptr. 14, 25 & n.11 (1976) (same), however, may implicitly suggest that state or other extra-constitutional law be used to particularize the meaning of "deprive." *See Fox v. Custis*, 712 F.2d 84, 88 & n.3 (4th Cir. 1983) (noting parallelism between significance of awareness of the specific risk under section 1983 and common law tort principles). Indeed, state law is routinely used to define other constitutional terms such as "liberty," *see, e.g., Hewitt v. Helms*, 103 S. Ct. 864, 869-71 (1983), and "property," *see, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

But this circuit has steered clear of this mode of analysis. In *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982), we held that state mental hospital officials were not liable for a knife-stabbing death at the hands of a released patient with a history of similar woundings and killings, not just because the killing was remote and the victim unidentifiable in advance, as in *Martinez*, but also because "[t]he Constitution is a charter of negative liberties," creating no entitlements to positive official action such as crime prevention, but rather only entitlements to be left alone in specified areas. *See also Jackson v. City of Joliet*, 715 F.2d 1200, 1203-05 (7th Cir. 1983) (police and firemen have no positive duty to rescue car accident victims), *petition for cert. filed*, 52 U.S.L.W. 3462 (U.S. Dec. 13, 1983) (No. 83-853); J. Ely, Democracy and Distrust 88-101 (1980). Because the duty must come from the Constitution and the Constitution creates no duties of positive action under the strict principles announced by *Baker v. McCollan* and *Bowers v. DeVito*, O'Neal cannot be liable under *Bivens* if his fault was merely failing to be a good Samaritan.

There are two problems with this analysis, however. First, *Bowers*'s generalization that the Constitution creates no affirmative duties is not strictly true.[1] In several situations involving government initiative or control the Supreme Court has recognized positive governmental duties arising from the Constitution: prison officials not only must refrain from actively imposing cruel and unusual punishments, but also must not be deliberately indifferent to prisoners' medical needs, *see Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976); the government is not altogether forbidden to take private property for public use, but must pay just compensation when it exercises that power; the government not only must permit criminal defendants to seek the assistance of counsel, but must provide counsel to certain indigent defendants, *see Johnson v. Zerbst*, 304 U.S. 458, 463 (1938); *see also Withers v. Levine*, 615 F.2d 158, 162 (4th Cir.) (duty to protect inmates from known risks of assault), *cert. denied*, 449 U.S. 849 (1980); *Davis v. Zahradnick*, 600 F.2d 458, 459 (4th Cir. 1979) (same); *Spence v. Staras*, 507 F.2d 554, 557 (7th

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[1] Indeed, isolated exceptions may not be the generalization's greatest flaw. As it applies to the states, at least, the Constitution may create exactly the kind of affirmative duty *Bowers* and *Jackson* deny. In the debate over the privileges and immunities clause of the proposed fourteenth amendment members of Congress repeatedly cited with approval the 1823 circuit decision of Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823), which described the privileges and immunities secured by article IV, section 2 of the Constitution as follows (emphasis added):

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: *Protection by the government*; . . . .

See J. Ely, Democracy and Distrust 28-29 (1980); *but see id.* at 83.

Cir. 1974) (same); *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973) (same). Indeed, *Bowers* itself recognized the limitations of its generalization, noting that the line between action and inaction is sometimes far from sharp. 686 F.2d at 618. "Inaction" when a murder is planned and committed in one's presence and perhaps with one's encouragement is far different from failure to anticipate and prevent the unplanned actions of a third party released from one's custody. *See Parratt v. Taylor*, 451 U.S. 527, 548 (1981) (Powell, J., concurring in result) (footnote omitted) ("A 'deprivation' connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss."). Whether such conduct constitutes "action" so as to be the basis of a charge of "deprivation" depends on the relationship of the parties involved, *see Fox v. Custis*, 712 F.2d at 88; it is clearest in straightforward custodial circumstances, when the fact of custody prevents one from fending for oneself, but may also be shown in other circumstances, as the right-to-appointed-counsel cases demonstrate. The relationship between O'Neal and Robinson may have been the type that would make "inaction"—at least when a life was known to be at stake—inexcusable.[2] The initiative by the FBI, a law enforcement agency, in encouraging O'Neal to accompany Robinson supports this

[2] Unlike *Bowers* and *Jackson*, O'Neal knew in advance that death was imminent, and accompanied and chauffeured the killer precisely for that reason. In *Bowers*, by contrast, the state officials merely released a man they did not know would kill; and in *Jackson* the state officials failed to realize that the burning car, away from which they directed other traffic, was occupied. In neither case did the defendants intend to allow death to occur. If the killer in *Bowers* had disclosed to the doctor-defendants a calculated design to kill the victim and yet was released and the victim not warned, or if the police-defendants in *Jackson* had peered in the windows watching the victims burning inside the car, those cases might have been different, for the defendants might then have been deemed more responsible for the loss of life.

(Footnote continued on following page)

characterization, despite Robinson's and Beard's ignorance of the FBI's role. Indeed, there is evidence in the record of an FBI policy that informants should intervene to prevent violence, *see* Pl. App. 568 (testimony of FBI expert in *Beard v. Mitchell*), and the FBI was on notice both from O'Neal's own prior experience with Robinson[3] and

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[2] *continued*

It is perhaps worthwhile to make two observations here, one concerning the nature of the interest at stake—life—and one concerning the fact that this is a *Bivens* action. In *Parratt v. Taylor*, 451 U.S. at 543-44, the Supreme Court held that a state post-deprivation hearing satisfied the due process clause in a negligent-deprivation-of-property case because a pre-deprivation hearing was impossible given the nature of negligence cases and because the outcome—restoration of the property or its value—would put the plaintiff back in his rightful position. *Jackson v. City of Joliet*, 715 F.2d at 1205, a section 1983 case, noted that *Parratt* and certain other cases were not on point, but nevertheless cited them as creating a "mood" of deference to state tort remedies. When the constitutionally protected interest is life, rather than property as in *Parratt*, however, it is difficult to conclude that a post-deprivation hearing (*i.e.*, a wrongful death action) is all the process due, because we can be very sure that it cannot duplicate the outcome of a pre-deprivation hearing. Except in capital punishment cases the only possible conclusion is that deprivation is improper. After the fact, of course, whether the deprivation was the result of negligence or intentional action, neither a federal nor a state remedy can completely restore the loss; but no one contends that a state wrongful death action that compensates as adequately as section 1983 supplants the federal action for intentional deprivation of life, *see Jackson*, 715 F.2d at 1204, and I cannot conceive why negligent deprivations should be treated differently. I conclude that *Parratt*'s "mood" is too ambiguous to provide guidance. In any case, this is a *Bivens* rather than section 1983 action, and the Supreme Court has explicitly held that the federal counterpart of the state wrongful death action, an action under the Federal Tort Claims Act, is not an adequate alternative to a *Bivens* remedy. *Carlson v. Green*, 446 U.S. 14, 19-23 (1980).

[3] O'Neal's involvement with Robinson, a late chapter in what the majority calls a "colorful" history, began in April 1972 when he was invited to join an armored car robbery. Robinson planned to finance the robbery with the proceeds of other robberies and

(Footnote continued on following page)

from other cases, *see Bergman v. United States*, 565 F. Supp. 1353 (W.D. Mich. 1983) (FBI undercover informant participated in beatings of "Freedom Riders" in Birmingham, Alabama, in 1961); *Liuzzo v. United States*, 565 F. Supp. 640 (E.D. Mich. 1983) (FBI undercover informant accompanied Ku Klux Klansmen who shot and killed a civil rights demonstrator in Montgomery, Alabama, in 1965), that informants found themselves in such situations. To conclude that such a special relationship exists is not to impose a duty to be elsewhere, as the majority facetiously suggests; it merely imposes on those who assume a duty and put themselves in the way of exercising it the obligation to do so when the circumstances warrant, as similar state laws do. *See* W. Prosser, Handbook of the Law of Torts 341-42 (4th ed. 1971). Whether such a special relationship existed is partly a question of fact, *see Bowers v. DeVito*, 686 F.2d at 619-20 (Wood, J., dissenting), and we cannot assume that all relevant underlying facts have already been determined, because as the majority demonstrates collateral estoppel and res judicata have no application here. I therefore conclude that summary judgment is improper.

The second difficulty is related to the first. It would be impossible to label O'Neal's conduct "inaction," whether or not he had a duty to intervene, if his participation was actually active. The majority asserts that "the undisputed facts reveal that there is no causal link between

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[3] *continued*
murder contracts. In the first such episode, under Robinson's direction, O'Neal, armed with an ice pick, searched, slapped, handcuffed, and twice tied a plastic bag over the head of a man from whom Robinson sought information. Pl.App. 301-08. In another O'Neal fired a gun at a car believed to contain the object of one of Robinson's murder contracts, *id.* 354; in the course of the attempted performance of that contract at least one, *id.* 268, 420-22, and perhaps two, *id.* 267, 351, victims of mistaken identity were killed. In a third O'Neal participated in the armed abduction of the object of another murder contract, who was released after he paid the abductors $400. *Id.* 381-96.

O'Neal's acts (as distinguished from his inaction) and Jeff Beard's death." Ante at 8. I disagree. It has never been decided or conceded that Robinson's actions were the sole proximate cause of Beard's death, and the facts as alleged in the complaint could support a contrary conclusion. The plaintiff alleges that O'Neal "participat[ed] and assist[ed] in" Robinson's actions, Pl. App. 40, and evidence in the record elaborates his active involvement: Robinson, who began searching for Beard knowing only "that he goes by the name of 'Jeff' and had an unusually high natural" hairstyle, *id.* 402, might not have located him but for O'Neal's insistence that he get more complete information, *id.* 403; O'Neal facilitated Robinson's "arrest" of Beard by driving the car and guarding Beard during two intervals when Robinson was absent, *id.* 447,[4] 418-19; when Robinson returned to the car after failing to kill Beard on the first try, O'Neal prompted him not to give up by telling him he "had really screwed up and that he was in big trouble," *id.* at 449.[5] The fact, if it is a fact,

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[4] O'Neal testified in a deposition about the first of these incidents as follows:

> I pulled off the freeway into a Shell station that was closed in front of a phone booth. Robinson left the vehicle telling me to watch Beard, went to the phone booth, [and] made a short call . . . .
>
> Q. How long was Robinson out of the car to make the call, about?
>
> A. Three to five minutes.
>
> Q. What did you and Mr. Beard talk about in the interim?
>
> A. Well, it was small talk, but I don't really recall exactly what the substance of it was.
>
> Q. Did you tell Mr. Beard he was about to die?
>
> A. No, sir.
>
> Q. Did you think Mr. Beard was about to die at that point?
>
> A. Yes, sir.

[5] O'Neal testified that when Robinson returned to the car after he had fired an ineffective shot and Beard had run away,

(Footnote continued on following page)

that Robinson would have committed the murder in a different fashion had O'Neal not assisted does not excuse any responsibility O'Neal bears for what actually occurred. Because it is disputed whether O'Neal's failures were entirely passive, summary judgment is inappropriate.

II

I also disagree with the majority's conclusion that summary judgment in favor of FBI officers Gray, Grant, and Moore in their individual capacities was proper. Although supervisors cannot be held vicariously liable in *Bivens* actions under the theory of respondeat superior, *see Lojuk v. Quandt*, 706 F.2d 1456, 1468 (7th Cir. 1983), they may be liable for constitutional deprivations for which they are personally responsible, *id*; *Crowder v. Lash*, 687 F.2d 996, 1005-06 (7th Cir. 1982) (section 1983 claim). The majority "doubt[s] that the F.B.I. defendants, who never had any immediate contact with O'Neal, could be found personally responsible." Ante at 11. But immediate contact with O'Neal is not indispensable, for we have noted that

> [w]ithout direct participation in the deprivation, an official can satisfy the personal responsibility requirement if "she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent."

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[3] *continued*

Oh, I made a statement to the effect that Robinson had really screwed up and that he was in big trouble. And he turned to me and said to the effect that he wasn't and that he would find Beard. And he ran across the highway after telling me to wait in the car.

Q. What prompted you to suggest that Robinson had screwed up and was in big trouble?

A. I don't recall exactly what my frame of mind was, but it just wasn't—it seemed to be an appropriate statement at that time.

Lojuk v. Quandt, 706 F.2d at 1468 (quoting *Crowder v. Lash*, 687 F.2d at 1005). We also indicated in *Lojuk*, *supra*, that this standard might be satisfied if there was "a plan or pattern of incidents which should have put [the] defendant . . . on notice" of the threat of deprivations of constitutional rights. In the present case the plaintiff alleges that such a pattern existed because of O'Neal's long history of participation in acts of violence, of which the FBI was aware, and that the FBI deliberately or recklessly failed to train, control, and supervise O'Neal in light of this history and the nature of the activities he was assigned to investigate. These issues present questions of fact that cannot be resolved on summary judgment.

It is arguable that L. Patrick Gray, then the Acting Director of the FBI, cannot be held personally responsible under this theory because of the breadth and generality of his oversight of FBI operations. In *Crowder v. Lash*, 687 F.2d at 1005-06, a section 1983 case challenging prison conditions, we upheld a directed verdict in favor of the state Commissioner of Corrections, because even though he had been informed of the conditions complained of, to impose liability there would justify holding any well informed commissioner personally liable in damages for any deprivations occurring at any prison within his jurisdiction, a result at odds with the personal responsibility requirement. I believe the posture of the present case makes it inappropriate to dismiss the claims against defendant Gray on this basis, however, because there has been no development of the necessary facts concerning his role in overseeing the Chicago FBI operations, either at trial or by affidavits accompanying motions for dismissal or summary judgment (for summary judgment was urged below on quite a different theory).

Apart from the question of the existence of a cause of action against Gray, Grant, and Moore, there is an additional question whether they are immune from liability for damages. The briefs contain extensive arguments about the appropriate standards of liability and immunity,

the plaintiff arguing that negligence is a sufficient basis for liability after *Parratt v. Taylor*, 451 U.S. at 534-35; the defendants replying that after *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), they are immune unless the constitutional right was clearly established at the time of the deprivation; the plaintiff rejoining that the constitutional right not to be deprived of life was well established; and the defendants retorting that whether negligent deprivations were actionable was not clearly established. These knotty questions need not be resolved now, however, because it is clear from the discussion above that to satisfy the personal responsibility requirement for liability in their supervisory roles the defendants must have acted recklessly or deliberately, and the right not to be recklessly or deliberately deprived of life was well established in 1972. Whether the requisite degree of recklessness existed remains a disputed fact.

III

I agree with the majority that sovereign immunity bars holding the FBI officials in their official capacities and the FBI itself liable. The United States and its agencies are generally immune from damage liability unless their immunity is expressly waived. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704-05 (1949). If this were a claim under the Federal Tort Claims Act, waiver of this privilege would be clear; but because it is not such an action and is not premised on any other waiver provision I conclude that the FBI is immune. The plaintiff argues that it would make sense to impose liability for constitutional deprivations on the government because the loss could be spread among society as a whole without chilling the exercise of officials' decisionmaking powers. *Owen v. City of Independence*, 445 U.S. 622, 635-56 (1980), relied partly on such arguments in holding that municipalities were not immune from damage suits under section 1983. *Owen* emphasized, however, that any "tradition of immunity . . . firmly rooted in the common law" was not over-

ridden by section 1983, *id.* at 637, and painstakingly demonstrated that "there is no tradition of immunity for municipal corporations," *id.* at 638; *see id.* at 638-50. The Supreme Court has not interpreted section 1983 as overriding the more firmly rooted immunity enjoyed by the states, *see Quern v. Jordan*, 440 U.S. 332, 338-45 (1979), despite Congress's power under section 5 of the fourteenth amendment to do so, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Because the United States' sovereign immunity is also well established, and indeed was strongly summarized in *United States v. Mitchell, supra*, decided the day before *Owen*; and because the Supreme Court has treated immunities from damages under section 1983 and *Bivens* similarly, *see Butz v. Economou*, 438 U.S. 478, 500-04 (1978), I conclude that the United States and its agencies are immune from damage liability in *Bivens* actions.

Defendants Gray, Grant, and Moore are immune from damage liability in their official capacities for the same reason. We recently noted that state officials enjoy such immunity because damage awards assessed against officials in their official capacity would be satisfied with state funds, an impermissible result given the states' own immunity. *Owen v. Lash*, 682 F.2d 648, 654-55 (7th Cir. 1982). The same reasoning applies to federal officials sued in their official capacity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. at 686-88. I hasten to note that this reasoning has been held not to bar damage suits against officials in their individual capacities, *id.* at 686-90, and does not bar injunctive or mandamus relief when an official acts unconstitutionally or beyond his power, *id.* at 690-91. *See also* 5 U.S.C. § 702 (1982) (waiving immunity for claims seeking relief other than money damages against federal officials and agencies).

I disagree, however, with the majority's intimation that the official-capacity claims are barred by res judicata principles because Gray, Grant, and Moore are in privity with Mitchell, who was exonerated in *Beard v. Mitchell*. Ante at 5. This argument has force only to the extent that

Mitchell and the current defendants were charged with official liability for the same wrong. But the individual misdeeds with which Gray, Grant, and Moore are charged are separate from the charges against Mitchell, and could not have been litigated in the earlier trial because Mitchell could not have been charged with liability for the misdeeds of his superiors. If the issue of Mitchell's culpability played a part in the later trial of the other FBI officials, relitigation of that issue might be barred, but the plaintiff certainly could still litigate the later defendants' own culpability. In any event, these arguments are unnecessary because sovereign immunity bars official-capacity damage claims.

IV

I dissent from the court's holding that summary judgment was properly entered in favor of O'Neal, because it is factually disputed both whether a special relationship existed between O'Neal and Beard, creating a duty to act, and whether O'Neal merely failed to be a good Samaritan or in fact played a more active role. I also dissent from the court's holding that summary judgment was properly entered in favor of FBI officials Gray, Grant, and Moore in their individual capacities. Officials may be liable for supervisory acts or failures to act provided they were sufficiently reckless or deliberate to be assigned personal responsibility. Such recklessness has been alleged, and remains a disputed issue of fact. I concur in the holding that the FBI and its officers in their official capacities are immune from liability for damages under traditional sovereign immunity principles.

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APPENDIX B

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELOISE BEARD, as Administratrix of the Estate of Jeff Beard, the Deceased, *Plaintiff,* vs. **WILLIAM M. O'NEAL, et al.,** *Defendants.*	No. 76 C 4706

MEMORANDUM OPINION AND ORDER

For the sake of economy, there will be no extensive recitation of the voluminous facts that gave rise to this cause af action.[1] For purposes of the summary judgment motions at hand the essential facts are as follows: Jeff Beard in whose name his sister brings this suit was murdered by Chicago policeman Stanley Robinson who was carrying out a murder contract. Defendant William M. O'Neal, a paid informant of the Federal Bureau of Investigation ("FBI"), accompanied Robinson in the abduction and murder of Jeff Beard. Decedent Jeff Beard's administratrix brought suit against FBI Special Agent Roy Martin Mitchell who was responsible for the supervision of informant O'Neal, for the reckless supervision of

[1] See *Beard* v. *Mitchell*, 604 F.2d 485 (7th Cir. 1979) for a full recital of the facts giving rise to this cause of action.

O'Neal by Mitchell and for Mitchell's failure to prevent the murder of Jeff Beard. The jury returned a verdict of not guilty of depriving the decedent of his rights under the United States Constitution in favor of Agent Mitchell. After entry of judgment on November 3, 1978, the administratrix appealed asking for a new trial charging improper instructions to the jury and assorted prejudicial errors during the course of the trial. The Court of Appeals upheld the lower court. The administratrix then filed this suit against O'Neal for his participation in the violation of decedent's civil rights and against L. Patrick Gray, Kenneth M. Grant and Roy K. Moore, the FBI superiors of Roy Mitchell, for their reckless supervision of Mitchell via their actions and policies. It is this suit that is before this court now.

O'Neal has never been served with process and the statute of limitations has run with respect to Mitchell. The present suit remains only as to defendants Gray, Grant and Moore. All three defendants move for summary judgment on the ground of lack of personal jurisdiction pursuant to Fed. R. Civ. P. 4(d)(1) or Local Rule 7(a), and on the alternative grounds of *res judicata*.

In simple terms, what we have here is a charge that defendants Gray, Grant and Moore are guilty of negligence and impropriety in their supervision of Mitchell, who in turn so improperly and negligently supervised the activities of informant O'Neal, that O'Neal conspired with and aided and abetted Stanley Robinson in his program of murder-for-hire as a result of which plaintiff's decedent was killed. Hence, the charge is that Mitchell illegally is responsible for the illegal conduct of O'Neal, and that Gray, Grant and Moore illegally are responsible for Mitchell's illegal conduct. However, the problem with this stacking of illegality is that in *Beard* v. *Mitchell* the plaintiff sought to establish the illegal conduct of Mitchell, but the jury found the conduct of Mitchell not to have been illegal as charged. This prior determination by a court of law raises the issue of whether or not the federal doctrines of former adjudication apply in the instant case.

The doctrines of former adjudication are often used to denote two aspects with respect to the effect of a valid, final judgment: (1) that such a judgment, when rendered on the merits, is an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand; and (2) that such a judgment constitutes an estoppel between the same parties or those in privity with them, as to matters that were necessarily litigated and determined although the claim or demand in the subsequent action is different. *Viles* v. *Prudential Ins. Co.*, 124 F.2d 78, 81 (10th Cir. 1941), *cert. denied*, 315 U.S. 816 (1942); 1B Moore's Federal Practice ¶ 0.405[1] at 621 (2d ed. 1974). Although both propositions have the same general objective—judicial finality, the federal courts, as well as Professor Moore, use the term *res judicata* to embrace only the first proposition and the term collateral estoppel is used to embrace the second proposition. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); 1B Moore's Federal Practice ¶ 0.405[1] at 622 (2d ed. 1974). In the instant case, the doctrine of bar under *res judicata* is pertinent for our analysis. We do not have a collateral estoppel problem because the charges, the stacking of illegality from O'Neal to Mitchell and then again to Gray, Grant and Moore, do not involve different claims or demands. The stacking of illegality is based on "the same cause of action" or "essentially the same course of wrongful conduct." See *Lawlor, supra,* at 326.

A bar under *res judicata* "prevents relitigation of all grounds for, or defenses to, recovery that were then available to the parties before the particular court rendering the judgment, in relation to the same claim—regardless of whether all grounds for recovery or defenses were judicially determined." 1B Moore's Federal Practice ¶ 0.405[1] at 622 (2d ed. 1974). However, before such an application of *res judicata* can be made to bar an action, certain crucial elements must be found: "there must have been a previous, final judgment on the merits by a court of competent jurisdiction, involving the same causes of action

between the same parties or their privies." *Church of New Song* v. *Establishment of Religion,* 620 F.2d 648, 652 (7th Cir. 1980), *cert. denied,* 450 U.S. 929 (1981). See also, *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573, 578-79 (1974). This court finds all of these elements present in the instant case.

Before a prior action can be *res judicata,* a final judgment in that action have been rendered. *Sypert* v. *Miner,* 266 F.2d 196, 198 (7th Cir. 1959). The United States Supreme Court has stated that it is "familiar law that only a final judgment is *res judicata* as between the parties." *G. & C. Merriam Co.* v. *Saalfield,* 241 U.S. 22, 28 (1916). Also, a final judgment "on the merits" means "the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form." *Glegg* v. *United States,* 112 F.2d 886, 887 (10th Cir. 1940). Plaintiff here argues that in *Beard* v. *Mitchell,* 604 F.2d 485 (7th Cir. 1979), the trial court was affirmed only on the grounds that the trial judge did not abuse his discretion regarding the case in giving certain instructions to the jury. However, the affirmance left the decision on the trial level the rule of law as to all matters before it. In particular, it left the jury's determination in favor of Mitchell final. "The defendant Mitchell was found not guilty by a jury properly instructed on the law after the completion of a lengthy and fair trial." *Beard, supra,* at 504. Thus, we have a previous final judgment on the merits by a court of competent jurisdiction—a necessary element in the doctrine of bar under *res judicata.*

Another requirement for applying the doctrine is the necessity that the same cause of action be involved in both the case at bar and the prior adjudication. Various tests have been suggested for determination of what constitutes a cause of action. For purposes of *res judicata,* there is no hard, mechanical rule to determine whether two cases involve the same cause of action. *Church of New Song* v. *Establishment of Religion,* 620 F.2d 648, 652 (7th Cir. 1980), *cert. denied,* 450 U.S. 929 (1981). However, one important

consideration is "whether the same evidence would suffice to sustain both judgments because the wrong for which redress is sought is the same in both actions." *Church of New Song, supra,* at 652. See also, *Woodbury* v. *Porter,* 158 F.2d 194, 195 (8th Cir. 1946).

In *Beard* v. *Mitchell* the court held *inter alia:*

> Even if the United States could be held liable the plaintiff's evidence did not demonstrate a triable issue as to their liability. The plaintiff failed to establish the existence of any F.B.I. policy encouraging the deprivation of civil rights, a necessary prerequisite to governmental liability. (Citations omitted.) 604 F.2d at 504 n. 30.

It further held:

> It is . . . therefore difficult to believe that a jury could have found Mitchell was *reckless* in his training and continued use of O'Neal . . . . Without exhaustive discussion of the evidence we state our conclusion that the trial court could have determined that there was not enough evidence 'from which the jury could have inferred the requisite unlawful behavior' thereby relieving any necessity to tender the specific instructions offered. (Citations omitted.) Thus on any of these bases, we conclude the judge did not commit reversible error in his charge to the jury. 604 F.2d at 499.

The liability of defendants Gray, Grant, and Moore is based on the alleged unconstitutional actions of Agent Roy Mitchell. No claim of the plaintiff against the defendants exists independently of the facts surrounding the conduct of Agent Mitchell. The issues of reckless supervision and deficient FBI policies have been already litigated and decided in the earlier action. The difference between *Beard* v. *Mitchell* and the present action is that the plaintiff is attempting to extend the claims of reckless supervision of William O'Neal and of defective FBI policies regarding informants, from Agent Mitchell, who has been found not guilty, to his superiors Gray, Grant, and Moore. Thus, the

same alleged wrongful conduct, evidence, and ultimate issues of the prior litigation and of this one are substantially the same. The plaintiff is attempting to relitigate these same issues by calling this a different cause of action by the mere addition of the named defendants.

Res judicata is applicable despite the difference in the names between the two actions. *Res judicata* principles obviate the relitigation of those theories already advanced as well as those which could have been advanced in the earlier litigation. *Mervin* v. *F.T.C.*, 591 F.2d 821, 830 (D.C. Cir. 1978); 1B Moore's Federal Practice ¶ 0.405[1] at 621-22 (2d ed. 1974); Restatement (Second) of Judgments §§ 61, 61.1 (Tent. Draft No. 1, 1973). That same alleged illegal conduct of Mitchell becomes a necessary link between the plaintiff's decedent and the defendants in the present action, but plaintiff, having once alleged and having failed to establish the Mitchell link should now be barred from realleging and relitigating that necessary link. This, we find, is the same case as far as Mitchell's conduct is concerned, and it is Mitchell's conduct that is at the core of the present action. Hence, we have the same cause of action as in the initial suit—another necessary element in applying the doctrine of *res judicata*.

A final aspect of applying *res judicata* is that a judgment has conclusive force only between persons who were parties to both actions or in privity with them. *McVeigh* v. *McGurren*, 117 F.2d 672, 678 (7th Cir. 1941), *cert. denied*, 313 U.S. 573 (1941). 1B Moore's Federal Practice ¶ 0.411[1] at 1251 (2d ed. 1974). Defendants Gray, Grant and Moore as the superiors of Agent Roy Mitchell were in sufficient privity with him to come within the same parties or privity requirement of *res judicata*. Privity is simply "a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res judicata*." *Bruszewski* v. *United States*, 181 F.2d 419, 423 (3rd Cir. 1950) (concurring opinion), *cert. denied*, 340 U.S. 865 (1950); 1B Moore's Federal Practice ¶ 0.411[1] at 1254 (2d ed. 1974). We feel that the supervising officers were administratively close enough to be deemed in privity with Mitchell. Furthermore, as the

United States Supreme Court said in *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381 (1940):

> There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.

Id. at 402-03. See also, *Mervin* v. *F.T.C.,* 591 F.2d 821, 830 (D.C. Cir. 1978). *River Valley, Inc.* v. *Dubuque County,* 507 F.2d 582 (8th Cir. 1974); *United States* v. *Willard Tablet Co.,* 141 F.2d 141 (7th Cir. 1944); *Second National Bank of Saginaw* v. *Woodworth,* 54 F.2d 672, 674 (E.D. Mich. 1931). Mitchell, Gray, Grant and Moore as members of the FBI are all government officials, and this privity standard clearly applies to them.

In conclusion, the *Beard* v. *Mitchell* litigation was a final judgment on the merits by a court of competent jurisdiction, involving the same cause of action between the same parties or their privies. Thus, the doctrine of bar under *res judicata* will prevent any further litigation of this matter. "*Res judicata* itself is based on public policy favoring an end to litigation." *Church of New Song* v. *Establishment of Religion,* 620 F.2d 648, 655 (7th Cir. 1980), *cert. denied,* 450 U.S. 929 (1981). Accordingly, defendants' motion for summary judgment must be granted. Since this decision now disposes of the case, the court need not reach the collateral issue of the court's personal jurisdiction over defendant Grant. The law applicable to the facts and circumstances discussed above dictates that this litigation should be brought to an end by the granting of the summary judgment motion and dismissal of cause. It is so ordered.

ENTER:

JAMES B. PARSONS
United States District Court Judge

DATED: March 29, 1982.

APPENDIX C

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELOISE BEARD, As Administratrix of the Estate of Jeff Beard, the Deceased, *Plaintiff*, vs. WILLIAM M. O'NEAL, *Defendant.*	No. 76 C 4706

MEMORANDUM OPINION AND ORDER

I have before me defendant William O'Neal's renewed motion for summary judgment. The gravamen of plaintiff Eloise Beard's complaint is that defendant O'Neal conspired with former Chicago Police Officer Stanley Robinson under color of state law and with F.B.I. Special Agent Roy Mitchell under color of federal law to deprive decedent Jeff Beard of certain constitutional rights. The cause of action for deprivation of civil rights under color of state law is pursued under 42 U.S.C. § 1983. The additional cause of action for deprivation of civil rights under color of federal law is brought pursuant to the doctrine of *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971).

Agent Mitchell in *Beard* v. *Mitchell*, 604 F.2d 485 (7th Cir. 1979), was found, by a jury, not guilty of depriving the decedent of rights under the United States Constitution. Recently, in the present suit this court entered summary

judgment on *res judicata* grounds in favor of Agent Mitchell's F.B.I. superiors, L. Patrick Gray, Kenneth M. Grant, and Roy K. Moore.

In the complaint plaintiff has been cast in terms of being an agent or employee of the F.B.I. Thus the charge of conspiring with Agent Mitchell to deprive decedent of his civil rights under color of federal law rests on his capacity as an agent or employee of the F.B.I. However, in *Beard* v. *Mitchell, supra,* the issue of F.B.I. liability was disposed of by the jury adversely to plaintiff. By the same force of reason in that decision and the subsequent *res judicata* decision in the present suit and considering all of the circumstances, I find as a matter of law that a *Bivens* action cannot be maintained against defendant O'Neal.

With respect to the charge of conspiracy involving O'Neal and Police Officer Robinson to deprive Beard of his civil rights under color of state law, summary judgment cannot be granted on the facts or as a matter of law in favor of defendant O'Neal. The materials submitted to the court reveal substantial questions of fact as to whether or not O'Neal in his activities with Robinson represented himself or permitted himself to be represented to Beard to be Robinson's partner as a police officer and culpably participated in a false arrest that had as its purpose the murder of the decedent. I find that the cause of action brought under 42 U.S. 1983 must be retained for trial. Accordingly, I deny defendant's motion for summary judgment as to the Section 1983 claim.

Defendant O'Neal's motion is granted insofar as the *Bivens* claim is concerned. It is denied insofar as the Section 1983 claim is concerned. It is so ordered.

ENTER:

JAMES B. PARSONS
United States District Court Judge

DATED: May 7, 1982.

APPENDIX D

Order of the United States District Court for the Northern District of Illinois

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Julius J. Hoffman

No. 76 C 4706 Date 1/31/79

Eloise Beard v. William O'Neal, et al.

For Ruling on Defendants' Motion to Dismiss

To the extent the plaintiff seeks to recover against the Federal Bureau of Investigation and/or against any of the individual defendants "in their official capacity" the motions to dismiss are granted.

The motion to dismiss this action to the extent that the plaintiff seeks to recover against defendants designated only as "Certain Officials of the Federal Bureau of Investigation Whose True Identities are Unknown to Plaintiff" is granted.

All motions now pending herein will be denied.

The plaintiff is granted leave to file a second amended complaint, said second amended complaint to conform to the rulings now made. That second amended complaint is to be filed on or before Feb. 13, 1979. Defendants to file their responsive pleadings on or before Feb. 23, 1979.

APPENDIX E

F.B.I. Manual of Instructions
Section 108. Criminal Informants

A. Definition

An individual who furnishes valuable information within our criminal investigative jurisdiction or concerning other criminal matters of interest to the Bureau.

B. Illustration

This type informant includes members of the underworld, those who closely associate with criminals or have intimate knowledge of criminal activities. Typical examples of such persons are madams, prostitutes, pimps, fences, con men, hijackers, robbers, burglars, hoodlums, gangsters, and those individuals who associate with or have knowledge of such persons.

C. Observation

The listing of an individual as an approved Bureau informant is dependent upon whether he or she can regularly furnish valuable criminal information. In most instances an individual will be approved who has:

1. Furnished worth-while information in two or more Bureau cases

2. Furnished worth-while information in one Bureau case and better than average information [relating to criminal intelligence investigations]

3. Furnished worth-while information in at least one Bureau case and in one other state or local case which is acted upon by the responsible authorities so as to obtain corroboration of the informant's report

4. Furnished worth-while information in at least one Bureau case and in one other Federal case which is acted upon by the interested Federal agency, so as to obtain corroboration of the informant's report

D. Development of Criminal Information

1. One of the most important responsibilities of an Agent is the identification of prospective criminal informants and the development of prospective informants to the point where they will regularly contribute information to the Bureau.

2. Criminal informants are used to:

a. Solve cases

b. Locate fugitives and witnesses

c. Report cases we would not otherwise receive

d. Report plans to commit offenses

e. Advise of general criminal activities

3. Informants are developed from those who volunteer to be of assistance; from subjects in cases investigated; from persons interviewed during investigations; and from selected prospects who are clearly in a position to obtain worth-while information. Their development frequently requires patient, protracted effort to find a basis for persuading them to cooperate in furnishing information.

4. Care must be exercised in attempting to persuade individuals to act as informants to avoid any allegations of undue influence. An individual who is in custody and who offers to furnish information generally does so in the hope that he will receive some consideration in return. Bureau Agents cannot promise any immunity or any reduction in sentence to a criminal who furnishes information and they must not put themselves in a position where they might subsequently be accused of having done so.

5. Once an individual has started to cooperate and furnishes information of value, his continued cooperation can frequently be assured through payments for services rendered and information furnished. There should be no reluctance in recommending substantial payments to informants who supply substantial assistance, if such payments are necessary to obtain the assistance.

6. Another important factor in the initial problem of getting a potential informant started is the appreciation for fair and impartial treatement sometimes generated during the handling of a case. Agents must be alert to recognize such feelings on the part of subjects and to capitalize on them. Should a subject indicate in any manner that he is appreciative, and should he be qualified to act as a real informant by virtue of his background and associates, then affirmative action should be taken to recontact him at frequent intervals fully to explore his potentialities.

7. In the initial stages of developing an informant, background data concerning him should be compiled, as outlined in section E below. Once all of this information has been gathered together the technique to be used in persuading the prospect to act as an informant will depend upon the peculiar circumstances involved in the individual case and upon the resourcefulness of the Agent endeavoring to develop the prospect.

8. Each field office must have criminal informants who do furnish information concerning all types of offenses within the Bureau's investigative jurisdiction. In addition, informants must be available to furnish information concerning general criminal activities. Each field office's informant coverage must be regularly planned and adjusted to the changing volume of offenses occurring in classifications, such as:

a. Theft from interstate shipment

b. Interstate transportation of stolen motor vehicles

c. White Slave Traffic Act

d. Interstate transportation of stolen property

e. Bank robbery

f. Interstate transportation of obscene matter

g. Interstate transportation of lottery tickets

h. Gambling

i. Gang activities

j. Politics in crime

9. The following list suggests other sources from which names of potential informants may be secured.

a. Reports on general criminal activities

b. Major criminal cases

c. Applications for restoration of civil rights (closed cases)

d. Modus operandi file of local police departments

e. Victims in White Slave Traffic Act cases

f. Professional bondsmen

g. Bartenders in low-class neighborhoods

h. Salesmen catering to prostitutes

i. Hotel employees in low-class neighborhoods

j. Complainants who contact Bureau offices under certain circumstances

k. Operators of roadside taverns

l. Madams

m. Informants

n. Retired police officers, but care should be exercised in seeking their assistance

10. After an informant has been developed, and unless some reason to the contrary exists, his fingerprints are to be obtained if they are not on file in the Identification Division. If the informant refuses, the issue is not to be forced. The informant's fingerprints, obtained solely for this purpose, are to be removed from the criminal files when the use of the informant is discontinued. A flash notice is to be placed by the field in the files of the Identification Division by submission of form FD-165, using informant's true name for each informant who has fingerprints on file. (Do not use form FD-9 to request an identification record on informant;

FD-165 is to be used for this purpose.) [The informant's FBI Identification Record number] should be included in the [Secure Teletype designating] a symbol number informant. Informant's fingerprints, when obtained, should be forwarded as enclosure to FD-165 using applicant-type fingerprint card, FD-258. This card should be properly executed showing subject's complete description, including date and place of birth. Appropriate field office should be shown as contributor, field case file number in number space, and "inquiry" in space for "company and address" on face of card. The flash should be removed when the informant is discontinued by submission of FD-165.

11. When subjects in Bureau cases are sentenced to the penitentiary, consideration should be given to the possibility that these subjects may be used as criminal informants upon their discharge. If there are any possibilities of eventually developing one or more subjects as potential informants upon their release, forward a letter to the Bureau requesting that a stop notice be placed with the Bureau of Prisons so that the appropriate office will be advised of the subject's release. The procedures to be followed in requesting that such a stop notice be placed are set out in Section 8, part II, Manual of Rules and Regulations, under the heading "Stop notice." Upon notification of subject's release, steps can then be taken to attempt to develop him as a criminal informant.

12. Parolees

As a condition of parole, which would include a conditional release, an inmate is required by U.S. Board of Parole to agree in writing that he will not act as an "informer" or special agent for any law enforcement agency. This condition applies to all releasees under the jurisdiction of the U.S. Board of Parole. While this procedure would not preclude accepting information from these persons, payments for information should not be made without prior Bureau approval. Once the period of parole has expired, these individuals may be considered for development.

E. Procedure In Listing Potential Criminal Informants and Criminal Informants

1. Before opening a 137 file on an individual to be considered for development as a potential criminal informant, the following elements must be present:

a. The individual under consideration must have been contacted at least once to evaluate his potential.

b. The individual must have an arrest record or criminal associates or be engaged in employment or activities (past or present) which make criminal information logically available to him.

2. When a prospective informant is identified:

a. Consolidate field office references in a file.

b. Obtain all readily available background data.

c. Obtain current FBI identification record by FD-165 which will also be used to place a flash notice against his fingerprints if available.

d. Request summary of additional information in Bureau files but not available in field office. Specifically state reason for belief Bureau files contain additional information.

3. When a potential informant has furnished worthwhile information in accordance with the provisions of section C above, a symbol number should be assigned. Direct a secure teletype to the Bureau containing:

a. Informant's name and all aliases

b. Symbol number assigned

c. Address at which contacted

d. Residence address

e. Description

f. Date designated informant (The date the informant was designated will be the date of the secure teletype.)

g. Estimate of reliability

h. Employment

i. Past activities

j. FBI Identification Record number

k. Criminal associates

l. Very specific details of information furnished in the past, including:

(1) Title and character of each case, and identity of report containing such information

(2) Date information furnished

(3) Estimate of the value of information

m. Deleted

n. A statement as to whether informant has shown any indication of emotional instability, unreliability, or of furnishing false information

If the Bureau has previously furnished a summary of data in Bureau files, set forth the date and caption of the Bureau letter furnishing such information.

4. The Bureau will advise the field office if the informant is not approved. In the absence of such advice, the individual recommended for listing as a criminal informant is to be considered an approved informant.

5. Once an informant has been listed and approved by the Bureau, such informant will continue to be listed for a reasonable period. This continued listing will depend upon:

a. Complete justification in subsequent semiannual letters of his ability to furnish information of a particular type should offenses of that type occur

b. Evidence that the informant is being regularly contacted

6. After the Bureau is advised of the symbol number for an informant, do not set forth the name of the informant in the heading but merely the symbol number. In all com-

munications after the initial [secure teletype,] the Bureau and field office file numbers for the informant must be set forth. In communications between offices, the same procedure is to be followed.

F. Maintaining Files on Criminal Informants

1. Individual files are to be maintained on all active and potential informants and are to be carried as pending active. Assignment and tickler cards are to be prepared, but do not show true name of informant or potential informant. The name of the informant is not to appear on the assignment and tickler cards. The files are to be included in the tabulations and calculations of delinquencies in the monthly administrative report. The handling of the subject of each of these files is to be assigned to an Agent who will be personally responsible for regular contacts.

2. If information which could be testimony is received from a symbol informant or a PCI, it should be put in FD-302 in exactly the same manner as information received from any other witness, and his name and address (without symbol number or PCI designation) should be set out. The original FD-302 is to be filed in the informant's file; a copy with the identity of the informant properly concealed shall be placed in the pertinent case file. The 137 file number should not be placed on the original or any of the copies of the FD-302. FD-209 shall be used as a cover sheet for the original FD-302 and copy and shall be stapled to the FD-302. The original FD-209 shall be serialized in the informant file and the copy of the FD-209 serialized in the case file. Neither the original FD-302 nor any copies of the FD-302 shall be serialized. The following should be stamped or typed on the FD-209 and copy: "Information herein obtained confidentially; informant's name is not to be disclosed in report or otherwise unless it has been decided definitely that he is to be a witness in a trial or hearing." Until it has been decided that the informant is to be a witness, information furnished by him should be sent to the Bureau and to other offices in the cover pages of a report. If furnished to the USA, it shall be forwarded by

letter. If the information received cannot be testimony, it is to be put in memorandum form; where none of the information concerns FBI jurisdiction, it may be put in one memorandum. Do not predicate an investigative report, in any case in which prosecution can be expected, on information attributed to an informant whose identity should not be revealed. So that it will be clearly recognized as the initial report in an investigation, language similar to the following should be used in the first report: "This investigation has been instituted for the purpose of determining if . . . ," followed by a statement of the objectives of the investigation, such as "a quantity of antibiotics had been stolen from the medical laboratory at Fort George G. Meade, Maryland."

3. Reports or memoranda concerning contacts with the informant shall not be placed in the informant's file unless and until assignments are made to run down any significant information. All substantial allegations received from informants must be followed to a definite conclusion.

4. Reports or memoranda showing the development of an informant or contacts with an informant should be posted on the assignment cards in the same manner as postings are made in any other type of case.

5. FD-209 may be used in recording contacts with approved and potential criminal informants. It may be used to extent deemed justified by SAC. Form may be filled out in longhand for brief reports and reports of negative contacts; lengthy reports should be typed and a second sheet used if necessary. Forms or memoranda prepared should show purpose of contact and cases discussed identified by file number; however, title must be shown on form or memorandum if positive information furnished. Contacts with informants are to be recorded in this fashion even if no information is developed. During each contact, informant's activities since previous contact should be carefully reviewed and contacting Agent should make certain informant has furnished in writing or verbally all information and data which he has obtained since last contact.

6. Requests that an Agent contact a criminal informant may be made in any manner deemed practicable by the SAC. Memoranda prepared for the requesting Agent showing negative contacts with criminal informants are not to be filed. Such memoranda of a purely negative nature are to be routed to the requesting Agent so that he may record in the case file the contact with the informant, following which the memorandum showing negative contact is to be destroyed. Memoranda showing positive contacts with informants are to be filed. The files of the informants must always show that contact was made with the informant regardless of whether the contact was of positive or negative nature.

7. If desired, subfiles may be opened in conjunction with the informants' files to permit filing information received from informants and avoid cluttering the file, when the flow of information is sufficiently voluminous.

8. All pending and closed symbol number informant files are to be maintained under lock and key under the personal supervision of the SAC, ASAC, field supervisor, or responsible employee designated by the SAC. These files are to be available to all Agents and must be reviewed before each contact with the informant by anyone other than the Agent to whom he is assigned.

9. Form FD-237 (printed on pink paper) has been approved for use in criminal informant and potential criminal informant files. It is to be used in the nature of a table of contents or as an index to show where in the file particular data can be found. This form is to be kept as the top document in the pertinent informant file and is not to be serialized.

G. Criminal Informant Index

1. A criminal informant index (on form FD-348) shall be maintained in each field office containing a list of informants by names and a separate list by symbol numbers. The names of potential criminal informants who have been

personally and favorably contacted in an attempt to develop them as such shall be included in the indices.

2. Name cards

a. Criminal informant and potential criminal informant name cards shall contain:

(1) Full name

(2) Residence address and telephone number

(3) Employment address, position, and telephone number

(4) Office file number

(5) Symbol number (Symbol numbers are not ordinarily assigned to potential informants.)

(6) Type of information

(7) Remarks

b. Deleted

c. Name cards shall be subdivided by state, towns or counties, type of information furnished when desirable, and then alphabetically.

3. Symbol cards

a. Criminal informant symbol cards shall contain:

(1) Symbol number

(2) Full name (geographical subdivision, if any)

b. The symbol index cards shall be arranged alphabetically by symbol and then numerically.

c. Symbols consisting of fictitious names shall be filed alphabetically behind the numerical symbol index section. This portion of the index shall be maintained in a specially designated drawer or index box in the same location as the name cards.

d. Agents should not have to handle the symbol cards when searching through name cards looking for

informants who can furnish a particular type of information.

4. When a criminal informant is discontinued, the symbol card shall be destroyed. The name card which contains the descriptive data outlined above shall be stamped "discontinued" or "canceled" and transferred to the symbol index. When a potential criminal informant fails to develop within a reasonable time, all cards relating to that potential informant shall be destroyed except the name card, which shall be placed in the source of information index, if appropriate, or shall be destroyed.

5. Numbers assigned to your informants are to be taken from the series of numbers used for your security, [extremist], criminal, and top echelon informants.

6. Once a number is assigned, it must not be subsequently reassigned to any other informant, source, or confidential technique, regardless of type or designation. If an informant is once discontinued and later reactivated, the original number should be used again for him.

7. The criminal informant index shall be maintained in the office and under the supervision of the SAC, ASAC, or the criminal supervisor, in the discretion of the SAC.

8. Index names of criminal informants in the general field office index in the same manner as any other name. If the informant is one with whom contact is restricted, the index card in the general field office index should not contain the informant's field office file number but merely the words "See SAC."

9. The Bureau must be advised whenever a criminal informant is added or discontinued.

10. The prefix of a symbol number is made up of the appropriate field office teletype abbreviation followed by the appropriate assigned number.

11. The suffix of the symbol number will consist of the letter "C" to designate criminal informant; the letters "PCI" to designate a potential criminal informant who has

been assigned a symbol number; the legend "C-TE" to designate a top echelon criminal informant; and the letters "PC" to designate a potential top echelon criminal informant.

12. Although an individual, confidential technique, or source may subsequently furnish information requiring a change in designation (e.g., from criminal to [extremist] or to top echelon, etc.), the number previously assigned will remain the same; however, the suffix is to be changed to the appropriate letter or letters indicating this change (NY 000-C to NY[000-E] or to NY 000-C-TE).

13. If there is a change in the current employment or activity which enables informant to obtain information, the change should be submitted by secure teletype.

H. Progress Letter

1. Monthly

A letter (original only, no abstract) must be mailed to the Bureau by the fastest special delivery mail service available by the third business day following the end of the month for which prepared.

a. Set up as follows:

Use form FD-374 as the first page of the letter. There are 13 items to be completed on this form, all of which must be answered either through the insertion of the appropriate figure, or by the use of the word "none" if no accomplishments were recorded.

b. Administrative accomplishments

Under item 2 list the symbol numbers of informants added and under item 3 list the symbol numbers of informants deleted. Do not list or count any informants added or deleted after the 25th of the month for which prepared. These informants should be listed and counted in the next monthly progress letter submitted.

c. Statistical accomplishments

Every statistical accomplishment which can be credited to criminal informants or potential criminal informants must be reported in the first monthly progress letter submitted after the accomplishment took place. Set out as follows:

> Opposite items 6-10 list the total number of subjects in each category who were arrested or located as a result of information furnished by criminal informants, or potential criminal informants, during the month. Item 7 is included in the total of item 6. Item 8 is not included in the totals of either items 6 or 7.
>
> Opposite items 11-13 list the total dollar value of stolen property recovered or property confiscated as a result of information furnished by criminal informants, or potential criminal informants, during the month.
>
> The statistics reported in items 9, 10, 12, and 13 are the accomplishments of other law enforcement agencies as a result of our referral to them of information furnished by an informant, or potential informant.

d. Documentation of statistics

Attach to form FD-374 (use as many pages as necessary) a schedule, headed by the name of the submitting office and the date, to show the sources of the statistics compiled on the form. This schedule will have three categories; namely, "Bureau Matters," "Local Matters," and "Other Federal Matters." Under each category will be listed in three columns the [criminal informant] symbol number or potential criminal informant [symbol number,] the title and character of the case, and the nature of the statistic being credited to the informant (such as "subject arrested" or "fugitive apprehended" or "subject located" or "$700 stolen

watches recovered"). If, as in the case of local, state, or other Federal violations, there is no case title, this information may be omitted; however, the description of the statistic should include enough information to identify the type of violation (such as "John Green arrested for local burglary" or "$475 stolen hams recovered from local burglary"). If two or more statistics result from one informant on one case, list the statistics separately opposite the informant (such as "subject arrested on narcotics charge. $700 narcotics recovered").

e. Outstanding accomplishments

Attach to form FD-374 and set out after "Documentation of Statistics," a succinct resume of any outstanding accomplishments that can be credited to your informants during preceding month. Include such items as major cases solved by informants, ring-type activity uncovered, or any highly significant intelligence information. If no outstanding accomplishments, state "none" on the attached page.

2. Semiannual

A semiannual letter shall be submitted concerning criminal informant coverage in each field office territory.

a. Except for those informants who have been the subject of a payment request letter or a letter designating the criminal informant within the past 90 days, an individual communication for each informant shall be submitted in duplicate on letterhead stationery, be dated, and show the place where made. These communications must contain:

(1) Symbol number

(2) Bufile number for informant

(3) [Deleted]

(4) Statement showing reason why 30-day contact not made if missed during preceding six months

(5) Outcome of cases not completed when previous semiannual letter submitted

(6) Succinct summary (identified by case title, character, and date) of information furnished or assistance rendered since last semiannual letter and an estimate of its value

(7) Deleted

(8) Deleted

Note: The above data are not required for regularly paid informants; communications pertaining to them should simply indicate they are being paid.

b. All communications shall be submitted to the Bureau by cover letter which should show the symbol numbers of informants in the territory covered by headquarters city and by each resident agency.

Schedule captioned "Potential Criminal Informants" shall list in alphabetical order each potential criminal informant who has been under development one year or longer and shall include for each one listed the date placed under development, brief statement outlining the basis for development, brief statement outlining efforts to develop potential criminal informant and information furnished to date (include case title, character, and date information furnished), and specific comments as to reasons for further efforts to develop.

c. The date on which each office should submit semiannual letters are as follows:

Office	Dates
Albany	January 15 and July 15
Albuquerque	" "
Alexandria	" "
Anchorage	" "
Atlanta	" "
Baltimore	January 31 and July 31
Birmingham	" "
Boston	" "
Buffalo	" "

Office	Dates
Butte	February 15 and August 15
Charlotte	" "
Chicago	" "
Cincinnati	" "
Cleveland	February 28 and August 31
Columbia	" "
Dallas	" "
Denver	" "
Detroit	" "
El Paso	March 15 and September 15
Honolulu	" "
Houston	" "
Indianapolis	" "
Jackson	" "
Jacksonville	" "
Kansas City	March 31 and September 30
Knoxville	" "
Las Vegas	" "
Little Rock	" "
Los Angeles	" "
Louisville	April 15 and October 15
Memphis	" "
Miami	" "
Milwaukee	" "
Minneapolis	April 30 and October 31
Mobile	" "
Newark	" "
New Haven	" "
New Orleans	May 15 and November 15
New York	" "
Norfolk	" "
Oklahoma City	" "
Omaha	" "
Philadelphia	May 31 and November 30
Phoenix	" "
Pittsburgh	" "
Portland	" "
Richmond	" "

Office	Dates
Sacramento	June 15 and December 15
St. Louis	" "
Salt Lake City	" "
San Antonio	" "
San Diego	" "
San Francisco	" "
San Juan	June 30 and December 31
Savannah	" "
Seattle	" "
Springfield	" "
Tampa	" "
Washington, D. C.	" "

I. Bureau Policy

1. All investigative activity must be made a matter of record in the field office files with all sources of information being completely identified. Sources include all confidential informants—criminal, racial, or security. Agents must not have and use informants known only to the individual Agents personally.

2. Criminal informants must be advised that they are not Bureau employees. It must be recognized that many such informants are also criminals and considerable care must be exercised in dealing with them so they will not become aware of and have the opportunity to obstruct the Bureau's work.

3. Arrangements must be worked out so that at least two Agents are in a position to contact each criminal informant. For a short time after an informant is first developed, it may sometimes be necessary to have one Agent make all contacts. However, a program must be established and actually started within six months after the informant is developed to establish a working arrangement so that a second Agent can contact such an informant. If any situation arises in which this cannot be done, the Bureau must be informed.

4. Consideration should be given to the assignment of specific projects to good informants, particularly those who have had little current opportunity to furnish information because of a temporary lull in criminal activity in the area in which the informant is utilized.

5. All informants and potential informants should be contacted as often as necessary, but at least one personal contact should be made every thirty days, unless there is some substantial reason for not doing so.

6. Information from informants of interest to another Government agency must be furnished to that agency. When information is passed on to local or other investigative agencies, or acted upon by the Bureau, the identity of the informant must be fully protected.

7. When it appears that a criminal informant or potential criminal informant shows indications of emotional instability, unreliability, or has furnished false information, advise the Bureau immediately and furnish information as to any instance in which such informant has appeared as a witness in behalf of the Government in a Bureau case and any instances in which he has furnished information which was disseminated to any other agency.

8. Constant care must be exercised to avoid any disclosure to anyone which might permit identification of a criminal informant or even cast suspicion on a criminal informant. The danger to be recognized and guarded against is that routine, everyday contacts with criminal informants. All result in a relaxing of our vigilance to protect informants. It must always be remembered that one slip or one misstatement may cause a criminal informant to be killed.

9. Where prosecution is contemplated in a matter in which information has been received from an informant and the USA can give no assurance of his ability to protect the informant's identity, no further action is to be taken until the Bureau can be advised and the case can be discussed with the Department.

10. Informants should furnish information to the Bureau exclusively. If under unusual circumstances they find it necessary to furnish information to representatives of some other agency or organization, be certain that they will first advise the Bureau of their intention to do so.

11. Informants should confine themselves to matters within the Bureau's primary investigative jurisdiction so far as it is possible to do so and should not become involved in procuring evidence regarding violations not within the Bureau's primary investigative jurisdiction.

12. Criminal informants should be cultivated on Government reservations and among military personnel when the investigative problems warrant this action. When a member of the armed services is cultivated as an informant, the SAC of the office cultivating the informant should consider the advisability of notifying the interested intelligence service of the armed forces.

13. The office supervising an informant must furnish to any other office using him a summary of information as to the informant, such as descriptive data, mode of travel, criminal background, an up-to-date identification record, and any other information pertinent to the assignment.

J. Paid Criminal Informants

1. Investigative employees must not approach, directly or indirectly, representatives of companies, private industries, or insurance companies and request assistance regarding payments of money, gifts, or products of such companies to informants. Gifts should not be given to criminal informants.

2. SAC may approve advances to an individual for expenses in obtaining information, for the performance of services, or for information on a c.o.d. basis, up to $400. Several payments or advances may be made under this general authority until the sum of such payments or advances aggregates $400. Thereafter, Bureau authority must be obtained before further payments or advances may be

made. The first communication to the Bureau requesting payments to PCI under SAC authority must contain description and [FBI Identification Record number (if available)] of the individual. If it is necessary to request a new $400 SAC authorization at the same time as [the secure teletype] designating the informant as an approved symbol number informant is being submitted, include all data in one [secure teletype.]

When requesting authority to expend an additional sum aggregating $400 on authority of SAC, submit original and one copy of letter. If authority granted, correspondence will be prepared and transmitted to the field. Letter must include statement and information required by paragraphs 3 and 4 (latter covering preceding authorization) of this section. If request not approved, correspondence will be prepared and transmitted to field.

3. Any communication to the Bureau recommending payment authorization to a criminal informant or potential criminal informant should include a statement as to whether there has been any indication on the part of the informant of emotional instability, unreliability, or of furnishing false information.

4. When requesting authority for additional payments or advances, advice should be furnished concerning:

a. The symbol number of the informant or, if no symbol number assigned, name of the PCI

b. The amount of each payment or advance made

c. The title and character of the case or cases involved

d. Details of information furnished or to be obtained

e. The value of the information or services

5. When it is recommended that regular payments be made to an informant, the recommendation should propose a maximum amount to be paid to the informant per day, week, or month. If the amount to be paid is on a per diem

basis, or on a "whenever used" basis, the maximum to be disbursed to the informant per month should be set.

6. Recommendation for continued payments to an informant who has been paid on a regular basis should set forth:

a. [Deleted]

b. Specific details of information received since submission of last progress letter. Set forth in a succinct manner

c. Title and character of case in which pertinent

d. Evaluation of the worth of the information and amount paid in each instance

Letters recommending renewal of authority to continue regular payments must be submitted promptly and at least two weeks prior to the expiration of the currently authorized period.

7. Submit an original and one copy of the letter requesting continued payments to criminal informants. If payments as requested are approved or denied, the field will be advised by separate communication. In addition, the initial payment authorization for an informant will be in the form of regular correspondence. Payment letters must be explicit. The first paragraph of your letter should read as nearly as possible as follows:

"I recommend that authority be granted to continue (increase, decrease) payments to the above informant up to $ (amount) per (month, week) for a period of months on a c.o.d. basis or for expenses to be incurred or services rendered in seeking information at our specific request. This authorization is to be effective (date) and letters of progress will be submitted (date set forth in original authorization letter showing letters to be submitted monthly, weekly, etc.) and my letter of (two weeks before expiration of authorization) will

contain my recommendation concerning further payments."

8. Blue slips (FD-37) reclaiming payments to regularly paid informants need only refer to the letter authorizing such payments. Blue slips reclaiming payments to individuals under the general authority set forth in item two of this subsection must clearly and accurately explain the circumstances and outline the information obtained so that the Bureau will be able intelligently to pass upon such blue slips.

9. If at any time regular payments are being made to an informant, it appears that the information being received or services being performed are not commensurate with the amount being disbursed, the payments should be adjusted or discontinued immediately. It must be recognized that a good informant can often obtain pertinent information in a matter of hours or days which would require much more time, if it could be obtained at all, by an Agent conducting investigation. Payments should be gauged by the following:

a. How much is it necessary to pay the informant to obtain the needed information?

b. How much would have to be paid to another informant to obtain the same information?

c. How much salary would be paid to an Agent during the time it would take him to obtain the same information?

10. Paid informants should not be paid for information they furnish to any other individual or agency.

11. Informants must also be instructed to report payments they receive as a part of their income when making income tax returns. See section [107L] for additional instructions on income tax returns applicable to informants.

12. Receipts

a. Receipts for payments to informants and sources should be obtained in every instance where possible to

do so. If a receipt cannot be obtained for a particular payment, complete circumstances should be set forth on the blue slip at the time reimbursement is claimed. Receipts should be self-sufficient so that, if it is necessary to introduce receipts in evidence during course of a trial, receipts will not relate to other documents or files.

b. These receipts should clearly show:

(1) Date of payment

(2) Period for which made (when informant paid on a period basis)

(3) Total of payment broken down into separate amounts for services or expenses where these items are pertinent

(4) Name of Agent making payment

(5) Signature of person receiving the money

c. Receipts are not to be witnessed by another Agent.

d. If necessary to make corrections on the receipts, such corrections must be initialed by the informant and not by the Agent.

e. When transmitting receipts and itemized statements of expenses to the Bureau, they should be stapled directly to the blue slip, leaving a margin of at least one inch to one and one-half inches at the top to avoid contact with the Acco fastener punch. The staples should be placed in such a manner that the date or other data appearing on the receipt will not be mutilated and all information on the receipt can be easily read without detaching it from the blue slip. Care must be taken to insure that receipts are of such a nature that they clearly record the payment of money and do not refer to any other documentary material contained in Bureau files.

13. Stipulation re payments made to witnesses

See section [107L] for instructions regarding preparation of tabulations of payments made to prospective witnesses.

K. Department Policy and Opinion

The Department has issued instructions to tell all USAs that informants of the Bureau shall not be interviewed or subpoenaed without prior consent of the Department. Any deviation from this policy should be immediately brought to the Bureau's attention.

On 7-10-52 the Department furnished an opinion regarding the question whether an informant could be prosecuted for technically violating the law while attempting to obtain evidence regarding a Federal violation. The Department stated ". . . If the intent throughout was to assist the government agents in the enforcement of the law, and not to violate or to 'cover-up' for a violation of the law, it is not believed a case for prosecution could be made against such an informer. . . ."

"The procedures to be followed by informers working under the supervision of your agents in the aid of enforcing the statutes coming within your jurisdiction largely rests upon your sound discretion. . . . It is not believed that an informer would be otherwise immune from prosecution for actions which would subject a Federal enforcement officer to prosecution."

L. Top Echelon Criminal Informant Program

1. The top echelon criminal informant program is aimed specifically at developing informants who can provide a continuous flow of quality criminal intelligence information regarding the leaders of organized criminal activity throughout the nation. It is directed at developing informants in the following categories:

a. Informants who are members of La Cosa Nostra (LCN)

b. Informants who can furnish significant information regarding other organized criminal groups

c. Informants at the top level of organized gambling activity who can provide information that will enable

the Bureau to effectively enforce the anti-gambling statutes

d. Informants who can produce accurate and authentic data regarding the extent of graft and corruption in each sector of the nation

e. Informants who can furnish information which will enable the Bureau to prosecute the hoodlum hierarchy

2. The development of informants who can provide information of this caliber is mandatory to insure the Bureau meets its commitments.

3. This program calls for the selection of targets for development. The selection should be based upon a combination of a particular hoodlum's qualifications by virtue of his position in the organized hoodlum element and upon circumstances indicating his possible susceptibility to development. To insure maximum security for an individual under development, he should be assigned a symbol number immediately upon being designated for attention. The symbol number for these individuals should be followed by the suffix PC to insure that they will be distinguished from regular criminal informant. The Bureau should be promptly advised whenever an individual is added or deleted from your program.

4. When requesting authority to add a target, include sufficient data in a [UACB] communication to indicate [that] the individual is a logical choice for inclusion in your program. [For purposes of security, this initial communication should always be transmitted by secure teletype and should] include such data regarding the proposed target as a complete description, [a summary of his] arrest record, and information indicating that [he has] access to significant information [concerning] top level racket figures. Insure that the program is not diluted by requesting authority to add targets who [should] more appropriately be considered PCIs.

5. A penetrative investigation of each individual selected as a target should be conducted prior to any approach of the individual. After completion of the penetrative investigation, request the Bureau to approve the interview of the target. The letter requesting such authority should set forth the approach to be utilized in the interview. A full exploitation must be made of any circumstances which place a target in a position whereby he will assist the Bureau. In making a determination as to an appropriate approach, all possibilities should be thoroughly explored.

6. The requirement of obtaining Bureau authority to conduct interviews is restricted to informant development interviews and does not preclude interviews conducted in connection with other investigations.

7. Advise the Bureau at a minimum of every 90 days of progress in attempting to develop each target designated for attention. Include positive information in summary form and also set forth your contemplated plan to effect the cooperation of the target. In subsequent communications point out the result of action taken and in the event your contemplated plan was not productive or feasible, advise of your alternate plan. Also include the specific number of times the top echelon source was contacted by the alternate Agent as well as the Agent to whom the case is assigned and set forth data regarding corroboration of the source's information.

8. A letter should be directed to the Bureau when an individual under development furnishes sufficient information to qualify him as a top echelon informant. This letter should follow the same format used to designate regular criminal informants, and the suffix of the symbol number should be changed to C-TE in accordance with subsection G, item 12, of this section.

9. Every effort must be made to insure the potential of each top echelon informant is fully utilized to the Bureau's advantage. Be particularly alert to the possibility of utilizing information from member-informants in LCN to further penetrate LCN.

10. Justification letters are to be submitted regarding top echelon informants, except those on a regularly paid status, on a triannual basis. Offices Albany through Newark should forward these letters by February 1, June 1, and October 1. Offices New York through Washington Field should submit these letters March 1, July 1, and November 1. Prepare these letters in the same manner as semiannual letters for regular criminal informants.

11. [Following the initial teletype communication, care should be exercised to make certain that subsequent communications to either the Bureau or other field offices containing information which may jeopardize the informant's identity are sent by secure teletype.]

[12.] For other regulations concerning the handling of top echelon criminal informants, be guided by instructions set out above for regular criminal informants.

Participation of Agents

On March 31 of each year furnish the Bureau a list of Agents in the office who have been assigned to criminal investigative matters 50 percent or more of the time during the previous year (excepting Agents assigned primarily to accounting investigations) and have not developed an informant or have not effectively operated an informant, during the same period, which they previously developed. The SAC is to provide an analysis of each listed Agent's performance and furnish as an attachment to the list explanations secured from all listed Agents, along with recommendations for administrative action.

Classification—137

APPENDIX F

Excerpts from the Testimony of Special Agent John Otto in *Beard v. Robinson*, No. 75 C 3204 (N.D. Ill. 1978), *aff'd sub nom., Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979)

October 24, 1978

DIRECT EXAMINATION

(Pages 471-473; page 474, lines 1-8.)

BY MR. HIRSHMAN:

Q Would you please state your full name, sir.

A My name is John Otto, O-t-t-o.

Q And where do you reside, sir?

A I reside in Naperville, Illinois.

Q What is your business address, sir?

A This building, 9th Floor.

Q And what is your present job or employment?

A I am the agent in charge of the Chicago Office of the Federal Bureau of Investigation.

Q Could you briefly describe your responsibilities as agent in charge of the Chicago Office of the Federal Bureau of Investigation?

A Well, I am responsible for the proper discharge of the Chicago Field Office of the FBI. We have quite a sizable office here and the responsibilities of the FBI cover in excess of some hundred and eighty criminal statutes that we have jurisdiction over.

Q And you are the agent in charge of this office?

A Yes, I am.

Q Sir, when did you take up the position of agent in charge of the Chicago Office of the Federal Bureau of Investigation?

A On February 28 of this year.

Q Could you briefly describe your career with the FBI from the time that you first became affiliated with the FBI to the present?

A I joined the FBI on October 12, 1964, and after a brief period of training at Quantico, Virginia was assigned to our Dallas, Texas Office, and then reassigned to what we refer to as a resident agency. It is a sub-office of the Dallas Office in Tyler, Texas. And served in that capacity as an investigator until approximately March of 1966, when I was transferred to Newark, New Jersey.

I was an investigator in our Newark Office for a period of a couple of months and then was transferred to the resident agency in Camden, New Jersey. And there I performed duties as an investigator for three years.

Thereafter I was transferred back to the Newark Office as the night supervisor, and I did that for approximately a year, and then I went as a regular criminal supervisor in the Newark Office, and did that for a year until approximately March of 1971.

Then I was transferred to the FBI headquarters and performed supervisory duties there for approximately two years, and was transferred to our inspection division as an inspector's aid, and spent approximately 13 months traveling around the United States on routine inspections of our field offices.

Following that I was reassigned as a supervisor at FBI headquarters until about February of 1975 when I went to Portland, Oregon as assistant agent in charge of the Portland Office.

About March of 1976 I was reassigned as an inspector and traveled out of our Washington, D.C. headquarters and inspected field offices and performed similar duties for ap-

proximately eight months, until the end of November of '76, and became the agent in charge of our Minneapolis Division of our Minneapolis Field Office where I served until February 28 of this year, when I reported to Chicago as the agent in charge.

Q Thank you. Could you please describe the responsibilities of an inspector, a position which you held on two occasions, is that correct?

A Inspector's aid the first time and inspector the second time. The main function of an inspector and inspector's aid is to travel to our various field offices and resident agencies throughout the FBI and also our headquarters, and inspect them to see that they are complying with current FBI rules and regulations.

Q And as a part of your responsibilities in the inspector's role, both as an aid and as an inspector, did you personally become familiar with the policies and rules and regulations of the Federal Bureau of Investigation?

A I did.

Q I would like you to focus your attention, sir, on the time period between January 1, 1972 and June 30, 1972. During that time period are you personally familiar with the rules and regulations of the Federal Bureau of Investigation?

A Yes.

* * *

(Page 486, lines 16-25; page 487, lines 1-5.)

BY MR. HIRSHMAN:

Q Mr. Otto, let me retender you Plaintiff's Exhibit 6.

Is that the entirety of the FBI policy with regard to criminal informants?

A The entire written policy at that time.

Q Was there some policy which was not in writing, sir, at that time?

A Practical operating policy which we adhered to and which may not be set out in these instructions existed to my recollection.

Q So the policy of the FBI at that time was both writings and practical instructions which were not in writing, sir?

A As I would define policy, yes, sir.

• • •

(Page 488, lines 8-14.)

BY MR. HIRSHMAN:

Q Was it, sir, or was it not a part of the practical instructions in the period from January 1, 1972 through June 30, 1972, those practical instructions which were policy, that every effort be made not to violate citizen's rights in any way, let alone by the use of informants?

A Yes.

• • •

(Page 491, lines 5-15.)

BY MR. HIRSHMAN:

Q During the period January 1, 1972 through June 30, 1972, with regard to that part of the FBI policy which was not in writing, did that policy create a special relationship between the FBI and the informant or did it not, sir?

A A special relationship exists between an FBI agent and an informant. I do not know that policy can establish or create that. It does, in fact, exist. It is not an employee relationship. However, it is a unique relationship.

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(Page 494, lines 3-20.)

BY MR. HIRSHMAN:

Q With your recollection refreshed, can you now answer the last question, sir?

A At the time of the deposition that you refer to, you asked the following, had stated the following: "Informants as such are not employees of the FBI, but the relationship of an informant to the FBI imposes a special responsibility upon the FBI when the informant engages in activity where he has received, or reasonably thinks he has received, encouragement or direction for that activity from the FBI."

You asked, "Does that state my understanding of the relationship of informants to the FBI that existed before December 15, 1976," and I replied, "Yes, it does."

Q Now, then, does that refresh your recollection with regard to the kinds of special relationship that existed between the FBI and its informants in the period January 1, 1972 and June 30, 1972?

A Yes.

* * *

(Page 494, line 25; pages 495-96; page 497, lines 1-16.)

BY MR. HIRSHMAN:

Q As it relates to activities in which the informant engages—in those activities in which the informant engages or where he has received or reasonably thinks he has received encouragement or direction for that activity from the FBI.

A Adding to my earlier remarks here.

Q Yes.

A The same remarks apply that I gave in the deposition where I continued to say we have never held the position that an informant is an employee or emissary or agent of the FBI, and as far as having a unique relationship or a special relationship, certainly that exists between the two, but employee status, no.

Q And that is the same—you would give that testimony with regard to the period January 1, 1972 and June 30, 1972, and that is your testimony today, sir?

A Yes.

Q Now, at that time, that is to say, January 1, 1972 through June 30, 1972, was it a consideration as a matter of policy that an agent was required to consider in using an informant whether or not there was a risk that the informant in a particular investigation or the conduct of a particular informant may, contrary to instructions, violate individual rights?

A Definitely a concern that this could happen.

Q And that was a consideration, was it not, that was to be weighed in January, during the period January 1, 1972 through June 30, 1972?

A Yes.

Q Now, was that consideration a written consideration, sir, or not?

A During that period, it would be a consideration that was not specifically stated in that manner, but was a policy consideration when handling and supervising informants.

Q Was it also a consideration at that time or was it not, of the measure of the ability of the FBI to control an informant's activities insofar as he is acting on behalf of the Bureau and ensure that his conduct will be consistent with applicable laws and instructions?

A Yes, but—

Q And that was—excuse me. Go ahead, sir.

A But we do not presume to have complete control, I might add to that reply.

Q But also, sir, do you or do you not presume to have some control?

A To the human extent possible and that would vary.

Q And your testimony relates to the period January 1, 1972 through June 30, 1972, sir?

A Yes.

Q Now, sir, during the period January 1, 1972 through June 30, 1972, was it or was it not an instruction to be given

all informants that they shall not participate in acts of violence?

A Yes.

Q And was it or was it not a part of the policy of the FBI at that time that informants be instructed not to participate in acts of violence because that somehow related to the duty of a special agent to uphold the Constitution of the United States and its laws?

A Yes.

Q And was it or was it not an instruction that should be given to an informant during the period January 1, 1972 through June 30, 1972 that an informant shall not initiate a plan to commit criminal acts?

A This would be one of the things that we would do as practical policy at that time, yes.

* * *

(Page 498, lines 15-25; page 499, lines 1-10.)

BY MR. HIRSHMAN:

Q Now, with regard to an informant who learns of the fact that a person under investigation intends to commit a crime, were there any instructions or were there not which were to be given to that informant with regard to his responsibilities at that time?

A If the crime was about to be committed in his presence, most administrative or supervisory FBI people and investigative FBI people would admonish the informant to do all within his power to discourage the criminal act from occurring, or at least minimize it, if at all possible.

Q And was it a part of the responsibilities and the policy of the Federal Bureau of Investigation in the period January 1, 1972 through June 30, 1972 to instruct informants in methods and ways that they might discourage violence or make attempts to save individuals, or was it not?

A Generally, yes. If you knew the specific circumstances the informant might encounter, then perhaps you might

address them more specifically. But it is very difficult to anticipate some of the things that are going to occur where you assign informants. Sometimes they are spontaneous and beyond anyone's control.

• • •

(Page 500, lines 9-25; page 501, lines 1-9.)

BY MR. HIRSHMAN:

Q Can you describe why the FBI has informants?

A Because they are, next to our own investigators, one of the most important investigative techniques and tools that we have.

Q And is it or is it not true that the informant is used to try and learn about criminal activity in advance and discourage it or prevent it?

A That would be the optimum, yes.

Q And that was the optimum in the period between January 1, 1972 and June 30, 1972?

A That is correct.

Q Could you explain, sir, how the use of an informant relates to the ability to stop crimes at the conspiratorial stage or at the earliest possible opportunity?

A This is one of the best traits of the informant technique, that is, an informant oftentimes can tell you in advance of a criminal conspiracy before it reaches the implementation stage. This is one of the reasons that we prize them so highly.

They often will hear in advance of a criminal act and hopefully with that knowledge, plus their additional assistance, you can many times prevent a crime from occurring by arresting for conspiracy or in some other way preventing the criminal act by just the mere knowledge of it.

• • •

(Page 507, lines 20-24.)

BY MR. HIRSHMAN:

Q Was it or was it not in the period January 1, 1972 through June 30, 1972 a primary concern of the FBI that people, citizens and informants not be hurt in the course of an investigation?

A Yes.

* * *

(Page 510, lines 13-25.)

BY MR. HIRSHMAN:

Q Have you now exhausted your recollection, sir?

A If the informant himself misbehaved or did something improperly that was substantial, jeopardizing what you were trying to accomplish, you may wish to reanalyze his effectiveness and what you wanted to do with him.

It is hard to give you all of the possibilities that might occur regarding why you would not want to use an informant. There are as many reasons as the type of cases that we get into. These would be essentially the main ones that have come to my mind right now.

I have not exhausted it, I am sure, but these would be the essential reasons.

* * *

(Page 512, lines 3-25; page 513, line 1.)

BY MR. HIRSHMAN:

Q Would it or would it not lead to a reevaluation of the use of the informant if the informant were instructed by a criminal under investigation to commit an assault?

A It would lead to a reevaluation, yes, but not necessarily a discontinuance.

Q But it would lead to a reevaluation, is that correct, sir?

A It would probably lead to a reevaluation in a majority of instances that occurred.

Q And can you explain the process of your evaluation, sir, if any, which existed in the period June 1, 1972 through June 30, 1972?

A The process of evaluation would be the same before, during and after that period. You would examine what it was that had happened, was it unavoidable in terms of the safety of all concerned or the majority of all concerned. You would want to see if by the virtue of the informant's presence he had in that instance been able to perhaps avert more trouble, more of an assault if you will. Perhaps continued use would also place him in a position to avoid further violence or assaults or at least give us enough specific information which could be corroborated to actually make the arrest to prevent total violence or maximum assault.

• • •

(Page 513, lines 8-25.)

BY MR. HIRSHMAN:

Q Could you describe the course of the reevaluation, sir, who would participate in such a reevaluation, if you know?

A The reevaluation could be depending upon the circumstances, the agent handling the informant. Depending upon the circumstances it may include a second peer-type agent comparable. It could include several peer-type agents, it could include the supervisor, it could include the assistant agent in charge of the office, it could include the agent in charge of the office or it could include authorities at headquarters. All of these things are possible depending upon the circumstances.

Q And those personnel would be available and that was part of their responsibility at that time, to be available to help in making such evaluations and reevaluations?

A To be available within a reasonable period of time, usually interpreted to mean within two hours in most instances.

• • •

(Page 516, lines 4-21.)

BY MR. HIRSHMAN:

Q You have testified that there was a policy with regard to what the FBI was to do when it learned that persons under investigation intended to commit a violent crime and what informants were to do in connection with that.

And I am not sure I asked you whether that was the policy between the period of January 1, 1972 and June 30, 1972. Do you recall your testimony on that, sir?

A Generally I remember that would have been the policy not to have them participate if they couldn't avoid violence and so forth. That was the area of questioning you were talking about.

Q Yes.

A That would have been the same.

Q And to attempt to discourage it?

A Certainly, certainly.

* * *

CROSS EXAMINATION

(Page 527, lines 14-25; page 528; page 529, lines 1-10.)

BY MR. BARNETT:

Q Mr. Otto, is there a particular area of humanity, if you will, that the FBI considers as suitable for drawing upon and developing criminal informants?

A Yes.

Q And how would you characterize that element of humanity?

A These are individuals who would have perhaps criminal backgrounds themselves, criminal associates, contacts with the criminal elements of our society.

Q And referring to Section 108 of the MOI as it existed in 1972, in Paragraph B is there an illustration of the

types of individuals who the FBI considers to be suitable for development as informants?

A Yes.

Q Would you read for the jury, please, Section B, the illustration?

A "This type informant includes members of the underworld, those who closely associate with criminals or have intimate knowledge of criminal activities. Typical examples of such persons are madams, prostitutes, pimps, fences, con men, highjackers, robbers, burglars, hoodlums, gangsters and those individuals who associate with or have knowledge of such persons."

Q And the reason for that is because those are the types of individuals who would be conversant with what may be going on in the criminal area, is that not correct?

A Yes.

Q And so that in order to further the goals of the Bureau with respect to fighting crime, you would have to have somebody if they were going to be used as an informant who was associated with a criminal element, is that not correct?

A Yes.

Q Okay. Now, it was the policy of the Bureau in 1972 to maximize the usage of informants, was it not?

A Yes.

Q And that is reflected in Paragraph D-1 of the 1972 version of the MOI, Section 108, is that not correct?

A Yes.

Q Would you please read for the jury Section D-1.

A It is captioned, "Development of Criminal Informants. One of the most important responsibilities of an agent is the identification of perspective criminal informants and the development of perspective informants to the point

where they will regularly contribute information to the Bureau."

• • •

(Page 530, lines 9-25; page 531; page 532, lines 1-17.)

BY MR. BARNETT:

Q Now, in Paragraph D-2 of Section 108 of the 1972 MOI which is Plaintiff's Exhibit 6, there is a listing of written policies concerning the purposes for the use of informants, is there not?

A Yes.

Q And would you please enumerate those purposes for the jury?

A Criminal informants are used to solve cases, locate fugitives and witnesses, report cases we would not otherwise receive, report plans to commit offenses, advice of general criminal activities.

Q And you stated two general areas which are the solution of crimes and the prevention of crimes in your previous answer.

A Yes.

Q Can you tell us how that group of five categories of purposes would fit into those two general categories, please?

A Well, the first item I mentioned, the stated policy in writing here in Section 108 is to solve cases and that is consistent with the policy that we operate with.

The other is to report plans to commit offenses and advise of general criminal activities, would aid us in learning about crimes in their planning stages so that we could hopefully prevent them from occurring.

Q Thank you.

Was there a policy in 1972, Mr. Otto, in the Federal Bureau of Investigation with respect to instructions to be given to informants?

A Yes.

Q To the best of your recollection, was that policy written, oral or both?

A Both.

Q With respect to the written policy, can you tell me where I might find it?

A The written policy would be contained not only in Section 108, but in a document that was referred to in the FBI as the pink sheet. The pink sheet was first serial on top of an informant file and it contained a list of instructions for operating an informant, things the informant must be told or must be done with the informant.

Q Can you tell us what you mean by the investigative jurisdiction of the Federal Bureau of Investigation?

A There are approximately 180 plus federal laws or statutes, if you will, that the FBI has either primary or concurrent jurisdiction over.

We also are subjected to directives from the President of the United States and the Attorney General and therein presently lies our area of responsibility and/or jurisdiction.

Q Okay. And your purpose of advising the informants of the investigative jurisdiction of the FBI was what?

A So that they would be directed to work on matters which pertain to our jurisdiction.

Q Okay. Now, in addition to these written policies, were there unwritten policies concerning instructions to be given to informants?

A Yes.

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(Page 533, lines 22-25; page 534; page 535, lines 1-21.)

BY MR. BARNETT:

Q In the period January 1 of 1972 to June 1 of 1972, were there unwritten policies with respect to instructions to be given to informants?

A Yes.

Q And can you tell me what those instructions were at that time?

A There would be various instructions, depending upon what it was that the informant was involved with at that time or what you were directing him to do. These instructions would include such things as admonishing him to refrain from any sort of misbehavior that he could, consistent with his own safety, prevent from happening. And he was instructed if there was an opportunity to develop information that could be used to substantiate a conspiracy violation to get that information to us as quickly as possible consistent with his own safety and the circumstances.

If he could prevent a crime from occurring consistent with his own safety and the safety of others he should try to do that. There are as many of these oral instructions as there are circumstances trying to and with the overall objective of not only solving crime, but preventing crime.

Q On direct examination, Mr. Otto, you stated that it would be the policy of the Bureau during that relevant period of 1972 to instruct an informant not to participate in acts of violence. That was part of the unwritten policy, was it not?

A Yes.

Q And as a matter of fact, that was part of the agent's responsibility having sworn an oath to uphold the law, is that not correct?

A Yes.

Q Now, as far as participation in acts of violence, is that an absolute rule that informants be instructed not to participate in acts of violence?

A I can't say that it's an absolute rule simply because you could not expect it to be absolutely carried out. The very nature of informants, you are going to have them placed in the middle of situations which could spontaneously erupt into violent acts. You cannot expect an informant or any other human being, an undercover FBI agent or what have you in some of these circumstances to have prevented acts of violence from having occurred.

But we hope that they can. Many times they have. And they report back to us and often we have been successful in preventing acts of violence because of their presence and reporting on the conduct of violence-prone individuals.

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(Page 537, lines 23-25; page 538, lines 1-2.)

BY MR. BARNETT:

Q As a matter of fact in 1972 the Bureau had obtained from the Department of Justice an opinion regarding whether or not an informant could be prosecuted for participation in technical violations of the law as part of an investigation, is that not correct?

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(Page 539, lines 22-25; page 540, lines 1-18.)

BY THE WITNESS:

A In Section 108 of our manual of instructions having to do with the handling of criminal informants under the caption, "Department Policy and Opinion," meaning the Department of Justice. In part it stated, "On July 10, 1952, the Department," once again Department of Justice, "furnished an opinion regarding the question whether an informant could be prosecuted for technically violating the law while attempting to obtain evidence regarding a federal violation." The Department stated, "If the intent throughout was to assist the Government agents in the enforcement of the law and not to violate or to cover up for a violation of the law, it is not believed a case for prosecution could be made against such an informant."

The second quotation on this from the Department: "The procedures to be followed by informants working under the supervision of your agents in the aid of enforcing the statutes coming within your jurisdiction largely rests upon your sound discretion. It is not believed that an informant would be otherwise immune from prosecution for actions which would subject the federal enforcement officer to prosecution."

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(Page 542, lines 6-25; page 543, lines 1-20.)

REDIRECT EXAMINATION

BY MR. HIRSHMAN:

Q Mr. Otto, you answered a question of Mr. Barnett's with regard to the rule against participation in violence not being absolute. Do you recall answering a question of Mr. Barnett's in that regard?

A Yes. Simply because you can't predict what is going to happen in many of the circumstances that the informant finds himself in while acting for you.

Q On your testimony as to my direct question, sir, you stated the rule as an informant shall not participate in the acts of violence. Are you changing that testimony?

A No. I'm not. I am saying that there are times when violence erupts beyond his control without his initiation. It simply happens. That's the nature of the assignment many times that he is on.

We instruct him he shall not participate in violence. He shall not encourage it. Quite the contrary, we want him to discourage it or prevent it.

What I'm observing is that it happens as human beings erupt into violence. It is unpredictable.

Q And though the instruction is that he shall not participate, there is nothing wrong with his participation when violence erupts, is that correct?

A There may be something wrong with it, but it may be beyond his control.

Q And is it—was this a significant consideration in the period between January 1, 1972 and June 30, 1972 with regard to maintaining an informant in a situation that he would be continuously in a situation where violence erupts?

A Certainly.

Q And what—

A We would be concerned about him being in this predicament for his own safety as well as the safety of others.

Q And if his continued presence in a situation facilitated violence, would that be a consideration in the period I have talked about—to be taken into consideration in whether or not to continue an informant in that situation?

A Yes.

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(Page 544, lines 6-16.)

BY MR. HIRSHMAN:

Q So it is your testimony, is it, that in the period between January 1, 1972 and June 30, 1972, an agent could instruct an informant to participate in acts of violence?

A No, not as a general rule. You would want him to avoid that, but we certainly would direct him to be around violence-prone individuals to find out what their intentions were. He would not be instructed to unless it was beyond his control and he is not going to be second guessed by anybody for perhaps preserving his life under a given set of circumstances.